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monograph 6

Pretrial Motions, Third Edition

Monograph 6: Pretrial Motions
Third Edition

Criminal Procedure Monograph Series 1–8

Michigan Judicial Institute

By **Hon. Dennis C. Kolenda, Mary E. Fielding, J.D., & Tobin L. Miller, J.D.**

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Acknowledgments

Criminal Procedure Monograph 6: *Pretrial Motions (Third Edition)* supersedes the revised edition of this monograph, published in 2001. This edition brings up to date the applicable statutes, court rules (including amendments to the rules governing criminal procedure effective January 1, 2006), and case law.

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Pretrial Motions

6

Part 1—General Requirements

6.1 Introduction

This monograph contains three parts. Part 1 discusses the general requirements for pretrial motions in criminal cases. Part 2 discusses individual motions that are commonly filed in criminal cases. Part 3 contains a table that summarizes the individual motions discussed in Part 2.

6.2 Time Requirements for Filing and Serving Written Motions

A. Time Requirements Under MCR 2.119

MCR 2.119 governs motion practice and generally applies to motions in criminal cases. See MCR 6.001(D) (rules of civil procedure apply to criminal cases except as otherwise provided by rule or statute, where a rule of civil procedure clearly applies only to civil cases, or where a statute or court rule provides a like or different procedure) and MCR 4.001 ("[p]rocedure in district . . . courts is governed by the rules applicable to other actions").

Unless the court sets a different time period, written motions must be filed at least seven days before the hearing on the motion, and any response must be filed at least three days before the hearing. MCR 2.119(C)(4). Unless a different period is provided by rule or set by the court for good cause, written motions and accompanying papers (other than ex-parte motions) must be served on the opposing party at least nine days before the time set for hearing if service is by mail. MCR 2.119(C)(1)(a). Service by mail is complete at the

time of mailing. MCR 2.107(C)(3). If service is by delivery as defined in MCR 2.107(C)(1) and (2), the motion must be served on the opposing party at least seven days before the time set for hearing. MCR 2.119(C)(1)(b).

Unless a different period is provided by rule or set by the court for good cause, any response to a motion must be served at least five days before the hearing if service is by mail, or at least three days before the hearing if service is by delivery. MCR 2.119(C)(2)(a)–(b).

If the court sets a different time period for serving a motion or response, the court's authorization must be in writing on the notice of hearing or in a separate order. MCR 2.119(C)(3).

Local court rules may establish additional procedural requirements for motion practice. For example, Rule 2.119 of the Third Judicial Circuit provides requirements for motions not contained in MCR 2.119.

B. Deadlines for Written Motions

In misdemeanor cases, the court may require pretrial motions to be filed and argued no later than the pretrial conference. MCR 6.610(B). See also Rule 6.100(B)(3) of the 40th Circuit Court Local Court Rules, which provides that, except for good cause, no pretrial motion shall be accepted after the pretrial conference is completed.

In *People v Grove,* 455 Mich 439, 469 (1997), the Michigan Supreme Court held that a trial court has discretion to refuse to accept a plea agreement reached after a "plea cut-off date" established in a pretrial scheduling order. The Court reasoned that former MCR 2.401(B)(1)(b)* was applicable to criminal cases pursuant to MCR 6.001(D). Under current MCR 2.401(B)(1)(c), a court may "enter a scheduling order setting time limitations for the processing of the case and establishing dates when future actions should begin or be completed in the case." Read together, these rules implicitly confer discretion to decline to entertain *actions* beyond the deadlines set by such scheduling orders. Although the *Grove* case involved a plea agreement, the Court's holding also clearly applies to motion deadlines in criminal cases.

*This rule has been renumbered MCR 2.401(B)(1)(c), but the text remains the same.

6.3 When a Motion to Suppress Evidence May Be Made During Trial

The general rule is that motions to suppress evidence must be made before trial. *People v Ferguson,* 376 Mich 90, 94 (1965), *People v Leonard,* 81 Mich App 86, 89 (1978) (motion to suppress confession), and *People v Childers,* 20 Mich App 639, 645–46 (1969) (motion to suppress evidence obtained from pretrial identification procedure).

Despite the general rule, a trial court has discretion to entertain a motion to suppress evidence at trial. In *Ferguson, supra,* the Michigan Supreme Court stated that "except under special circumstances the trial court may, within its sound discretion, entertain at trial a motion to suppress." The Court declined in that case to define the circumstances under which a trial court may exercise its discretion to entertain a motion to suppress evidence at trial but gave as an example a case in which facts concerning an allegedly illegal seizure are not known sufficiently in advance of trial. *Ferguson, supra* at 94–96. In *Ferguson,* the Court found no abuse of discretion in the trial court's refusal to entertain a motion to suppress evidence (a gun) that was allegedly the fruit of an illegal search and seizure. The defendant did not claim that he was unaware of the factual circumstances surrounding the allegedly illegal seizure prior to trial. Moreover, the defendant was identified at the preliminary examination as having wielded the gun, and the warrant and information referred to the gun. See also *People v Davis,* 52 Mich App 59, 60 (1974) (trial court did not err in refusing to conduct an evidentiary hearing during trial because defendants and defense counsel knew well before trial that a weapon had been seized during defendants' arrest), and *People v Williams,* 23 Mich App 129, 130–31 (1970) (where defendant was aware of all facts surrounding his arrest and the challenged search and seizure, defendant waived the issue of the legality of the search and seizure by failing to move to suppress the evidence before trial). Defendants have the responsibility to inform defense counsel of facts surrounding the acquisition of evidence. *People v Soltis,* 104 Mich App 53, 55–58 (1981), modified on other grounds 411 Mich 1037 (1981) (defendant had the responsibility to inform defense counsel that he had given a written statement to police).

Hearings on the admissibility of confessions must be conducted out of the hearing of the jury. MRE 104(c). Hearings on other preliminary matters must be conducted outside the jury's presence where the interests of justice require or, when the accused is a witness, if he or she so requests. *Id.*

6.4 Required Form of Written Motions

Unless made during a hearing or trial, a motion must be in writing, must state with particularity the grounds and authority on which it is based, must state the relief or order sought, and must be signed by the attorney or party filing the motion. MCR 2.119(A).

A court may, in its discretion, dispense with or limit oral arguments on motions and may require the parties to file briefs in support of and in opposition to a contested motion. MCR 2.119(E)(3). MCR 2.119(A)(2) requires a motion or response that presents an issue of law to be accompanied by a brief citing the authority on which it is based.

The formal requirements of motions and accompanying briefs are contained in MCR 2.119(A)(2).* That rule states, in part:

> "Except as permitted by the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 pages double spaced, exclusive of attachments and exhibits. Quotations and footnotes may be single-spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point type. A copy of a motion or response (including brief) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten."

*Many jurisdictions have local court rules governing the form of motions.

Permission to file a motion and brief in excess of the 20-page limit should be requested sufficiently in advance of the hearing on the motion to allow the opposing party adequate opportunity for analysis and response. *People v Leonard,* 224 Mich App 569, 578–79 (1997).

6.5 Requirements for Supporting Affidavits

Unless specifically required by rule or statute, a pretrial motion need not be verified or accompanied by an affidavit. MCR 2.114(B)(1). However, when a motion is based on facts not appearing on the record, the trial court has discretion to require affidavits. MCR 2.119(E)(2). Affidavits must conform to the requirements of MCR 2.113(A) (an affidavit must be verified by oath or affirmation) and MCR 2.119(B). Pursuant to MCR 2.119(B)(1), an affidavit filed in support of or in opposition to a motion must:

> "(a) be made on personal knowledge;
>
> "(b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and
>
> "(c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit."

Affidavits must be served on the opposing party within the time limits stated above in Section 6.2. See *Hubka v Pennfield Twp,* 197 Mich App 117, 119 (1992) (trial court erred by relying on an affidavit produced on the day of the hearing).

6.6 When Evidentiary Hearings Must Be Conducted

In *People v Wiejecha,* 14 Mich App 486, 488 (1968), the Court of Appeals stated:

> "The right to a separate evidentiary hearing when an attack on the admissibility of evidence is made on constitutional grounds was pronounced by the United States Supreme Court in *Jackson v Denno,* [378 US 368 (1964)] . . . .
>
> "The defendant has a right to have an evidentiary hearing on his motion [to suppress evidence]. The defendant has this right in every case, jury and non-jury, if such a hearing is requested."

However, in *People v Reynolds,* 93 Mich App 516, 519 (1979), where the constitutionality of an identification procedure was challenged, the Court of Appeals concluded that an evidentiary hearing must be conducted whenever a defendant challenges the admissibility of evidence on constitutional grounds *and* there is any factual dispute regarding the issue. In *People v Johnson,* 202 Mich App 281, 285–87 (1993), the Court of Appeals ruled that there is no right to an evidentiary hearing on the issue of the constitutionality of an identification procedure *if there is no factual support for the challenge*. Therefore, a judge need not hold an evidentiary hearing if no factual dispute exists. See also *Bielawski v Bielawski,* 137 Mich App 587, 592 (1984) (trial court should first determine whether contested factual questions exist before conducting an evidentiary hearing in a child custody case).

Under MCR 6.110(D), the court need not conduct an evidentiary hearing during a preliminary examination if there is a preliminary showing that the evidence in question is admissible. If an evidentiary hearing is conducted during the preliminary examination, a party may obtain a review of the District Court's determination in the Circuit Court; if no evidentiary hearing was conducted during the preliminary examination, a party may request an evidentiary hearing in the Circuit Court. MCR 6.110(D) states:

> **"(D) Exclusionary Rules.** If, during the preliminary examination, the court determines that evidence being offered is excludable, it must, on motion or objection, exclude the evidence. If, however, there has been a preliminary showing that the evidence is admissible, the court need not hold a separate evidentiary hearing on the question of whether the evidence should be excluded. The decision to admit or exclude evidence, with or without an evidentiary hearing, does not preclude a party from moving for and obtaining a determination of the question in the trial court on the basis of
>
> (1) a prior evidentiary hearing, or

> (2) a prior evidentiary hearing supplemented with a hearing before the trial court, or
>
> (3) if there was no prior evidentiary hearing, a new evidentiary hearing."

If the attorneys for the parties agree, a motion to exclude evidence made or filed in the Circuit Court may be premised on the preliminary examination transcript. MCR 6.110(D) and *People v Kaufman,* 457 Mich 266, 275–76 (1998), overruling in part *People v Talley,* 410 Mich 378 (1981), and *People v Zahn,* 234 Mich App 438, 442 (1999).

6.7 Rules of Evidence, Burden of Proof, and Findings of Fact at Evidentiary Hearings

Pursuant to MRE 1101(b)(1), the Michigan Rules of Evidence, except those with respect to privileges, do not apply to the determination of questions of fact preliminary to admissibility of evidence under MRE 104(a). Michigan Rule of Evidence 104(a) states that "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b)." Michigan Rule of Evidence 104(a) applies to determinations of whether the technical or constitutional rules allow admission of proffered evidence. The "preponderance of evidence" standard applies to determinations of whether the technical requirements of the rules of evidence have been met. *Bourjaily v United States,* 483 US 171, 176 (1987).*

*The required burden of proof for constitutional questions of admissibility varies and is discussed throughout this manual where relevant.

Michigan Rule of Evidence 104(b) deals with the admissibility of evidence, the relevance of which must be established by proof of other facts. That rule states:

> "(b) *Relevancy conditioned on fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

For example, evidence proffered under MRE 404(b) of uncharged misconduct* by the defendant may only be relevant if it is shown that the misconduct occurred and that the defendant committed the misconduct. At an evidentiary hearing on such issues, the court must only find that there is sufficient evidence for the trier of fact to find, by a preponderance of the evidence, that the conditional fact has been proven. *Huddleston v United States,* 485 US 681, 690 (1988), and *People v VanderVliet,* 444 Mich 52, 74 (1993). Whether the conditional fact has actually been proven is for the finder of fact to decide at trial. *Id.*

*See Section 6.40, below, for further discussion of the admissibility of evidence of uncharged misconduct.

For determinations of admissibility under MRE 104(a), the trial court sits as the trier of fact and determines the credibility of witnesses and resolves

conflicts in their testimony. *People v Yacks,* 38 Mich App 437, 440 (1972), and *People v Smith,* 124 Mich App 723, 725 (1983). With regard to the admissibility of evidence under MRE 104(b), the court must not determine the credibility of witnesses or resolve conflicts in their testimony. *Huddleston, supra.*

Findings of fact and conclusions of law are unnecessary in motion decisions unless required by court rule. MCR 2.517(A)(4). If the court makes findings and conclusions, they may be stated on the record or in a written opinion. MCR 2.517(A)(3). Written findings on pretrial motions are not required. *People v Oliver,* 63 Mich App 509, 522–23 (1975). For purposes of appellate determination of whether a trial court has committed clear error in its findings of fact, MCR 2.613(C), and whether the trial court properly applied the law, findings of fact and conclusions of law are advisable. Compare *People v LaBate,* 122 Mich App 644, 647-648 (1983) (in light of record evidence raising questions about entrapment, the cause was remanded for an evidentiary hearing following the trial court's failure to make adequate findings of fact and conclusions of law), and *People v Shields,* 200 Mich App 554, 558–59 (1993) (although specific findings of fact and conclusions of law are preferred for purposes of appellate review, no court rule requires such findings and conclusions, and no remand is necessary following a bench trial where the trial court's findings regarding the charged offense indicated that the trial court was aware of and resolved the factual issues raised by the motion to suppress evidence).

6.8 Motions for Rehearing or Reconsideration

A circuit court, acting as an appellate court in review of a district court order or judgment, possesses the authority to reconsider its own previous order or judgment on the matter. *People of the City of Riverview v Walters*, 266 Mich App 341, 346–50 (2005).

Except as provided in MCR 2.604(A), a motion for rehearing or reconsideration of the decision on a motion must be filed and served within 14 days of the entry of the order disposing of the motion. MCR 2.119(F)(1). Under MCR 2.604(A), an order is "subject to revision before entry of final judgment." "[T]he 14-day time limit on motions for reconsideration contained in MCR 2.119(F)(1) should not deter a trial court from correcting its interim orders whenever legally appropriate." Dean & Longhofer, Michigan Court Rules Practice (4th ed), §2604.2, p 351. No response to the motion may be filed and no oral argument is allowed unless the court directs otherwise. MCR 2.119(F)(2). The standard for granting or denying motions for rehearing or reconsideration is set forth in MCR 2.119(F)(3), which states as follows:

> "Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be

> granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error."

In *People v Turner,* 181 Mich App 680, 683 (1989), the Court of Appeals stated that the rehearing procedure contained in MCR 2.119(F) "allows a court to correct mistakes which would otherwise be subject to correction on appeal, though at much greater expense to the parties."

Palpable error is not a mandatory prerequisite to a court's decision to grant a party's motion for reconsideration. *Walters, supra* at 350–52. Adherence to the palpable error provision contained in MCR 2.119(F)(3) is not required; rather, the provision offers guidance to a court by suggesting when it may be appropriate to grant a party's motion for reconsideration. *Walters, supra* at 350.

Where a different judge is seated in the circuit court that issued the ruling or order for which a party seeks reconsideration, the judge reviews the prior court's factual findings for clear error. *Id*. at 352. The fact that the successor judge is reviewing the matter for the first time does not authorize the judge to conduct a de novo review. *Id*.

Part 2—Individual Motions

6.9 Introduction

This part of the monograph contains discussion of commonly filed pretrial motions in criminal cases. For each motion discussed, the moving party, burden of proof, and general discussion of applicable law are provided. This portion of the monograph contains a general discussion of applicable law. The reader is urged to do further research when addressing more specific questions that arise in a particular case.

6.10 Motion for Adjournment or Continuance

Moving Party: Defendant or prosecuting attorney

Burden of Proof: The moving party has the burden of establishing good cause for the adjournment. MCL 768.2 and MCR 2.503(B)(1).

Discussion

MCL 768.2 states in part:

> "No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown in the manner provided by law for adjournments, continuances and delays in the trial of civil causes in courts of record . . . ."

A trial court has no duty to order a continuance in the absence of a request by a party. *People v Elston,* 462 Mich 751, 764–65 (2000). When requested by a party, continuances and adjournments are within the discretion of the trial court. *People v Williams*, 386 Mich 565, 575 (1972). However, the trial court is not required to exercise that discretion unless there is a showing of good cause and diligence by the moving party. *People* v *Taylor*, 159 Mich App 468, 489 (1987).

Four factors are important for determining whether a defendant is entitled to an adjournment:

1) Is the defendant requesting the adjournment so that he or she may assert a constitutional right (e.g., the right to be represented by competent counsel)?

2) Does the defendant have legitimate grounds for asserting this right (e.g., an irreconcilable *bona fide* dispute with counsel over whether to call alibi witnesses)?

3) Is the defendant guilty of negligence for not having asserted this right earlier?

4) Has the defendant caused the trial to be adjourned at other times? *Williams, supra* at 578, *People* v *Wilson*, 397 Mich 76, 81–83 (1976), and *People* v *Holleman*, 138 Mich App 108, 112–14 (1984).

The *Williams* four-factor test for reviewing a defendant's request for continuance also applies to a defendant's request to adjourn a preliminary examination. *People* v *Eddington*, 77 Mich App 177, 185–91 (1977).

Effective January 1, 2006, MCR 6.005(E) allows a court to "refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel."

Requests for adjournments and continuances may also be made under MCR 2.503(C), the court rule governing the granting of adjournments on the basis of a witness's unavailability. MCR 2.503(C)(1)–(2) state:

> **"(C) Absence of Witness or Evidence.**
>
> (1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be

> made as soon as possible after ascertaining the facts.
>
> (2) An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence."

In *People v Jackson*, 467 Mich 272, 277–79 (2002), the Michigan Supreme Court held that the trial court abused its discretion in denying a continuance after a key prosecution witness, who previously had submitted a statement to police and testified at the preliminary examination, failed to appear on the date set for trial. The Supreme Court found that, contrary to the findings of the trial court and Court of Appeals, the prosecution did not fail to make "diligent efforts," as required by MCR 2.503(C)(2), to produce the witness. The police had successfully served a subpoena, and the witness had previously cooperated with the police and prosecution. See also *People v Coy*, 258 Mich App 1, 19 (2003) (trial court properly denied a defendant's request for adjournment where the motion was made on the first day of trial and "[t]here was no evidence that [defendant] made any effort, much less a diligent one, to locate [the witness] before requesting the adjournment").

The defendant in *Coy, supra,* similarly failed to establish good cause for an adjournment to complete DNA testing of an individual's blood sample taken one week before trial. *Coy*, *supra* at 20–22. The trial court denied the defendant's motion to adjourn until the DNA tests on the individual's blood were complete because the individual's alibi was corroborated, he was not considered a suspect, the defendant was dilatory in requesting the blood tests, and the individual's involvement in the victim's death was highly speculative. *Id*.

A trial court abused its discretion when it refused to grant the prosecution's motion for adjournment after the complainant and two other prosecution witnesses failed to return to court following a lunch recess. *People v Grace*, 258 Mich App 274, 277–78 (2003). In *Grace*, the trial court dismissed the charge against the defendant after 17 minutes elapsed following a lunch recess and the complainant and two primary witnesses had not yet returned. The Court of Appeals noted that the record showed the missing witnesses' testimony was material to the case, the prosecutor had attempted to locate them, and the witnesses' history suggested their continued cooperation. *Id*.

Where the defendant is not at fault for the unavailability of an alibi witness, the trial court's refusal to grant a short continuance to obtain the witness's testimony is an abuse of discretion. *People v Pullins,* 145 Mich App 414, 417–18 (1985). However, where the delay is caused in part by the defendant's negligence, the trial court does not abuse its discretion by denying a request for continuance. *People v Sekoian,* 169 Mich App 609, 614 (1988).

Where the trial court permits the late endorsement of a witness, the trial court should ordinarily grant a continuance to preserve the defendant's right to a fair trial. *Wilson*, *supra* at 81–83, and *People v Powell,* 119 Mich App 47, 50–52 (1982). Where four days before trial codefendants pled guilty, made new statements describing the defendant's participation in the charged offenses, and agreed to testify against the defendant, the trial court abused its discretion in denying defendant's motion for a continuance. *People v Suchy,* 143 Mich App 136, 139–48 (1985).

"[T]he desire of trial courts to expedite court dockets is not a sufficient reason to deny an otherwise proper request for a continuance." *Williams, supra* at 577.

MCL 768.2 states the following regarding stipulations for adjournments, continuances, or delays:

> "[N]o court shall adjourn, continue or delay the trial of any criminal cause by the consent of the prosecution and accused unless in his [or her] discretion it shall clearly appear by a sufficient showing to said court to be entered upon the record, that the reasons for such consent are founded upon strict necessity and that the trial of said cause cannot be then had without a manifest injustice being done." *Id.*

6.11 Notice and Pleading Requirements for Asserting an Alibi Defense

Moving Party: Defendant

Burden of Proof: "Although a defendant does not have the burden of proof on the alibi issue, he has the burden of producing at least some evidence in support of his claim of alibi, possibly sufficient evidence to raise a reasonable doubt." *People v Fiorini,* 85 Mich App 226, 229–30 (1985). See also *People v McCoy,* 392 Mich 231, 235 (1974) (a defendant need not prove his or her alibi by a preponderance of the evidence but must only raise a reasonable doubt concerning his or her presence at the crime scene). A defendant's general denial of the charges does not constitute an alibi defense; however, uncorroborated testimony by the defendant regarding his or her whereabouts at the time of the offense does constitute alibi testimony and entitles him or her to a jury instruction. *People v McGinnis,* 402 Mich 343, 346–47 (1978).

Discussion

In felony cases, MCL 768.20(1) requires that written notice of intent to claim an alibi defense be filed and served within 15 days of arraignment but not less than 10 days before trial, or at such other time as the court directs. However, Michigan appellate courts have construed this statute to require only that the notice be filed not less than 10 days before trial. *People v Bennett,* 116 Mich App 700, 703–07 (1982). The notice must contain, as particularly as is known to the defendant or defense counsel, the names of witnesses whom the defendant intends to call to establish the alibi. The notice must also contain specific information about the place where the defendant claims to have been at the time of the offense. Requests for continuances to perfect an alibi notice should be evaluated under the four-factor test set forth in *People v Wilson,* 397 Mich 76 (1976). *People v Hill,* 88 Mich App 50, 56 (1979).*

*See Section 6.10, above, for the four factors.

The prosecuting attorney must file and serve a rebuttal notice within 10 days of receiving the defendant's notice, but not later than 5 days before trial, or at such other time as the court directs. The notice must contain, as particularly as is known to the prosecuting attorney, the names of rebuttal witnesses whom the prosecutor intends to call to controvert the defense. MCL 768.20(2). A prosecutor must list the name of a rebuttal witness even though that witness is listed in the defendant's notice of alibi. *People v Wilson,* 90 Mich App 317, 320–21 (1979), relying on *People v Alexander,* 82 Mich App 621, 627 (1978). But see *People v Coulter,* 94 Mich App 531, 534–35 (1980), where the Court of Appeals held that the trial court's ruling during trial allowing the testimony of rebuttal witnesses constituted notice "at such other time as the court directs." The Court of Appeals found that the defendants could not have been surprised by the prosecutor's calling the witnesses because the prosecutor told defense counsel several days before trial of his intention to call the witnesses, who were listed in defendants' alibi notices. A prosecutor "minimally complies" with the statute by listing "any or all endorsed witnesses" as possible rebuttal witnesses. *People v Finley,* 161 Mich App 1, 10–11 (1987).

The parties are under a continuing duty to disclose the names of additional witnesses as they become known after the filing of the required notices. Additional witnesses may be called if the party shows that the names of the additional witnesses were not known at the time the notice of defense or rebuttal was required to be filed and could not have been discovered through the exercise of due diligence. MCL 768.20(3). See *People v Diaz,* 98 Mich App 675, 680–82 (1980) (where the prosecutor learned of a rebuttal witness's identity through the a codefendant's trial testimony, the trial court properly allowed the rebuttal witness to testify), and *People v Bell,* 169 Mich App 306, 308–10 (1988) (where defendant's alibi witnesses declined to give statements to police before trial and the prosecutor was unable to learn the identity of a rebuttal witness until defendant's alibi witnesses testified at trial, the trial court did not err in allowing the rebuttal witness to testify).

MCL 768.21(1)–(2) allow the court to exclude evidence offered by the defendant or prosecuting attorney for the purpose of establishing or rebutting

an alibi defense. If the required notice is not filed and served at all, the court must exclude the proffered evidence. In addition, if the notice given by the defendant or the prosecuting attorney does not state, as particularly as is known to the party, the name of a witness to be called to establish or rebut the defense, the court must exclude the testimony of the witness.

Despite the language in MCL 768.21(1)–(2) that suggests that exclusion is mandatory if a proper notice is not filed, the trial court retains discretion to fix the timeliness of a notice. *People v Travis,* 443 Mich 668, 679 (1993). In exercising its discretion, a court should consider:

1) the amount of prejudice resulting from the failure to disclose;

2) the reason for nondisclosure;

3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events;

4) the weight of the properly admitted evidence supporting defendant's guilt; and

5) other relevant factors arising out of the circumstances of the case.

Id. at 681–83, citing *United States v Myers,* 550 F2d 1036, 1043 (CA 5, 1977).

6.12 Motion to Dismiss for Delay in Arrest Resulting in Prejudice to Defendant

Moving Party: Defendant

Burden of Proof: The court must balance prejudice to the defendant's need for a prompt and fair adjudication and the prosecuting attorney's reasons for the delay. The defendant has the burden of coming forward with evidence of actual and substantial prejudice to his or her right to a fair trial. If the defendant makes a showing of prejudice, the prosecuting attorney has the burden of persuading the court that the reasons for the delay outweigh the prejudice resulting from the delay. *People v Bisard,* 114 Mich App 784, 791 (1982). In *Bisard,* the Court of Appeals stated the following with regard to the amount of prejudice that must be shown:

> "When a delay is deliberately undertaken to prejudice a defendant, little actual prejudice need be shown to establish a due process claim. Where, however, there is a justifiable reason for the delay, the defendant must show more—that the prejudice resulting from the delay outweighs any reason provided by the state." *Bisard, supra* at 790.

Note: In federal courts, the defendant must show actual and substantial prejudice to his right to a fair trial and intent by the prosecution to gain a tactical advantage. Several Michigan Court of Appeals decisions have set forth this test as the rule in Michigan. See *People v Crear,* 242 Mich App 158, 166 (2000), and *People v White,* 208 Mich App 126, 134 (1994), citing *United States v Marion,* 404 US 307, 324 (1971), and *United States v Lash,* 937 F2d 1077, 1088 (CA 6, 1991). For discussion of the difference between the Michigan and federal tests, see *People v McIntire,* 232 Mich App 71, 94 n 11 (1998), rev'd on other grounds 461 Mich 147 (1999) (declining to decide which test should be applied).

Discussion

The speedy trial guarantees in the United States and Michigan Constitutions become operative only after the institution of formal proceedings. However, due process requirements prohibit inordinate delay in the bringing of criminal charges, even though the applicable statute of limitations has not expired. *United States v Marion,* 404 US 307, 313–14 (1971), *United States v Lovasco,* 431 US 783, 789 (1977), and *People v Anderson,* 88 Mich App 513, 515 (1979). The actual prejudice resulting from a delay in arrest violates due process, not the delay itself. *People v Hernandez,* 15 Mich App 141, 146 (1968).

The burden is on the defendant to show "actual and substantial" prejudice to his or right to a fair trial. See *People v Cain,* 238 Mich App 95, 110 (1999), *People v Adams,* 232 Mich App 128, 134 (1998), and *People v Loyer,* 169 Mich App 105, 120 (1988) (allegations of prejudice must be specific rather than speculative). When arguing that the death of material witnesses or loss of evidence has resulted in prejudice, the defendant must show that the witnesses or evidence would have been beneficial to the defense. *Cain, supra* at 109–11 (witnesses' "slight memory failure" regarding dates and unspecified unpreserved evidence insufficient to establish prejudice), *Adams, supra* at 137–39 (defendants failed to show that testimony from deceased witnesses and lost physical evidence would have been exculpatory), *McIntire, supra* at 95 (lost impeachment evidence is insufficient to demonstrate prejudice), *People v Dungey,* 147 Mich App 83, 88 (1985) (where test results lost their ability to exclude the defendant as the person who committed a sexual assault, the defendant suffered requisite prejudice to shift the burden to the prosecutor)*, People v Tanner*, 255 Mich App 369, 415 (2003), rev'd on other grounds 469 Mich 437 (2004) (defendant's vague claims of "faded memories and lost witnesses," without a specific showing how the alleged deficiencies actually and substantially impaired her defense, held to be too speculative and insufficient to establish actual and substantial prejudice), and *People v Musser*, 259 Mich App 215, 220 (2003) (defendant could not show actual and substantial prejudice where a defense witness' testimony in support of the defendant never wavered, even though the record showed that the witness

"was exposed to intense cross-examination regarding his memory of the events" that occurred 13 months before defendant's arrest).

In *Lovasco, supra,* 431 US at 795–96, the United States Supreme Court distinguished between "investigative delay" and delay deliberately undertaken to prejudice the defendant. The court must find not merely that the delay was intentional, but that the delay was undertaken to prejudice the defendant, that the prosecuting attorney acted in bad faith. *Bisard, supra* at 787–91, and *People v White,* 59 Mich App 164, 165 (1975). See also *Crear, supra* at 166 (a defendant must prove prejudice and an intent by the prosecution to gain a tactical advantage). A prosecutor may wait to charge until satisfied that the evidence is convincing beyond a reasonable doubt. A charge is not required once probable cause exists. *McIntire, supra* at 95–96, and *Lovasco, supra,* 431 US at 790–91. In *Adams, supra* at 139–45, the Court of Appeals found that the prosecutor did not delay prosecution solely in anticipation of a change to the rules of evidence that would allow the admission of the hearsay statements of an alleged accomplice. See also *Tanner, supra* (trial court did not err in finding that the five-year delay between the initial request for arrest warrant and initiation of criminal charges resulted from the police conducting further investigation and from the prosecutors being dissatisfied with the sufficiency of the evidence—two proper bases to delay prosecution).

Other acceptable explanations include the delay occasioned by waiting for the disposition of other charges or the impaneling of a grand jury, *Lovasco, supra,* 431 US at 797 n 19, and the delay that occurred because the defendant fled to avoid prosecution, *People v Johnson,* 41 Mich App 34, 43 (1972). Delayed arrest often occurs in cases involving undercover investigation of drug sales, and the fear of "blowing the cover" of undercover officers is considered an adequate explanation for delay. *Bisard, supra* at 787, *Anderson, supra* at 516, and *People v Betancourt,* 120 Mich App 58, 62 (1982).

6.13 Motion to Reduce or Increase Bail

Moving Party: The prosecutor or defendant may file a motion to increase or reduce the amount of bail. The trial court may also modify a prior release decision.

Burden of Proof: "The party seeking modification of a release decision has the burden of going forward." MCR 6.106(H)(2)(c).

Discussion

The Michigan Rules of Evidence do not apply to "proceedings with respect to release on bail. . . ." MRE 1101(b)(3).

On motion of a party or on its own initiative, the court may modify a prior release decision or reopen a custody hearing regarding a defendant. MCR 6.106(H)(2) states in part:

> "*(a) Prior to Arraignment on the Information.* Prior to the defendant's arraignment on the information, any court before which proceedings against the defendant are pending may, on the motion of a party or its own initiative and on finding that there is a substantial reason for doing so, modify a prior release decision or reopen a prior custody hearing.
>
> "*(b) Arraignment on Information and Afterwards.* At the defendant's arraignment on the information and afterwards, the court having jurisdiction of the defendant may, on the motion of a party or its own initiative, make a de novo determination and modify a prior release decision or reopen a prior custody hearing."

In *People v Wershe,* 166 Mich App 602, 606 (1988), a case decided prior to the advent of MCR 6.106, the Court of Appeals held that a judge's redetermination of a magistrate's initial bail decision does not constitute a review of that magistrate's bail decision. The Court of Appeals reasoned that further information regarding the alleged offense and the accused is typically presented as the case moves to preliminary examination and bindover; therefore, a judge must have the authority to make a new bail decision, which may then be appealed. *Id.* at 607. MCR 6.106(H)(2) now reflects a judge's authority to make this new bail decision.

In its initial bail determination, the court must state the reasons for its determination on the record, but the court is not required to make findings on each of the factors contained in MCR 6.106(F)(1). MCR 6.106(F)(2). Those factors are:

> "(a) defendant's prior criminal record, including juvenile offenses;
>
> "(b) defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;
>
> "(c) defendant's history of substance abuse or addiction;
>
> "(d) defendant's mental condition, including character and reputation for dangerousness;
>
> "(e) the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence;

> "(f) defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;
>
> "(g) the availability of responsible members of the community who would vouch for or monitor the defendant;
>
> "(h) facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence, and
>
> "(i) any other facts bearing on the risk of nonappearance or danger to the public." MCR 6.106(F)(1)(a)–(i).

If a party files a motion seeking review of a release decision, the lower court's order may not be stayed, vacated, modified, or reversed unless the reviewing court finds an abuse of discretion. MCR 6.106(H)(1). The Circuit Court must have a transcript of the District Court proceedings concerning the setting of bail. Without such a transcript, there cannot be review of the issue. *People* v *Szymanski*, 406 Mich 944 (1979). Upon a finding of an abuse of discretion by the lower court in fixing bail, the trial court may only modify the bail provisions (including the amount of the money bail) after having considered the factors mandated by the court rule governing bail (MCR 6.106(F)(1)(a)–(i)). *People* v *Weatherford*, 132 Mich App 165, 170 (1984). See also *Atkins v Michigan,* 644 F2d 543, 550 (CA 6, 1981) (the Michigan Court of Appeals erred by twice cancelling the defendant's bond without stating its reasons for doing so).

"In reviewing a bail decision, more than perfunctory compliance [with the applicable court rule] is required . . . . Defendants must also be allowed to present any additional material evidence, which could have originally been considered in the setting of bail, if the evidence was not available when bail was originally set. A record must be made of this proceeding. . . ." *People* v *Spicer*, 402 Mich 406, 410–11 (1978).

"Money bail is excessive if it is in an amount greater than reasonably necessary to adequately assure that the accused will appear when his presence is required." *People* v *Edmond*, 81 Mich App 743, 747–48 (1978), citing *Stack v Boyle,* 342 US 1 (1951).

6.14 Motion to Determine Defendant's Competency to Stand Trial

Moving Party: The issue of defendant's competence to stand trial is usually raised by the defendant, but it may be raised by the prosecuting attorney or by the court.

Burden of Proof: The defendant must prove incompetence by a preponderance of the evidence. See *Medina v California,* 505 US 437, 449 (1992) (it does not violate the federal constitution for a state to presume that the defendant is competent and to require him or her to prove incompetence by a preponderance of the evidence).

Discussion

A defendant must be competent to stand trial or plead guilty. MCL 330.2022(1) and *People v Kline,* 113 Mich App 733, 738 (1982). See also *In re Carey,* 241 Mich App 222, 226 (2000) (a juvenile may not be adjudicated delinquent while incompetent, and the procedures applicable to adults should be employed). A criminal defendant is presumed competent to stand trial. MCL 330.2020(1). The determination of a defendant's competence is within a trial court's discretion. *People v Newton (After Remand),* 179 Mich App 484, 488 (1989).

The standard of competence to stand trial is stated in MCL 330.2020(1):

> "[A defendant] shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during trial."

In *People v Stolze,* 100 Mich App 511, 513 (1980), the victim shot defendant in the head during the charged assault; as a result defendant suffered amnesia regarding the offense. The Court of Appeals held that the trial court did not err in finding the defendant competent to stand trial. The Court relied on the following language from *Dusky v United States,* 362 US 402, 403 (1960): "the test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Stolze, supra* at 514.

In *People v Hall,* 97 Mich App 143, 145 (1980), rev'd on other grounds 418 Mich 189 (1983), defense counsel raised the issue of the defendant's competence prior to the preliminary examination. A preliminary examination was conducted, but the parties agreed to delay the bindover determination until the results of the defendant's competency examination were returned. The defendant was initially determined incompetent. After the defendant was found competent to stand trial, he was bound over to Circuit Court and pled guilty to second-degree murder. On appeal, the Court agreed that the defendant had not been provided a valid preliminary examination because he was found incompetent at the time of the exam. However, the Court found that

the defendant waived his right to preliminary examination by pleading guilty to the charged offense in the Circuit Court. *Id.* at 147.

1. Raising the Issue of Competence

A criminal defendant's competence to stand trial or participate in other criminal proceedings may be raised by a party or the court at any time during the proceedings. MCR 6.125(B) and MCL 330.2024. When facts are brought to the trial court's attention that raise a *bona fide* doubt about a defendant's competency to stand trial, the trial court has a duty to raise the issue *sua sponte* even though defense counsel does not request a competency examination. *People v Harris* 185 Mich App 100, 102–03 (1990). Otherwise, the defendant must make a sufficient showing in order to be entitled to commitment for an examination. *People v Stripling,* 70 Mich App 271, 276 (1976).

In *Drope v Missouri,* 420 US 162, 177 n 13, 180 (1975), the United States Supreme Court set forth relevant considerations to determine when the issue of a defendant's competency should be explored further. Those considerations are 1) an expressed doubt by counsel concerning a client's competency although a court is not required to accept such representations without question, 2) evidence of a defendant's irrational behavior and demeanor at trial, and 3) prior medical opinion regarding the defendant's competency to stand trial. See also *Owens v Sowder,* 661 F2d 584, 586–87 (CA 6, 1981) (defense counsel did not document prior psychiatric problems and defendant's behavior did not suggest need for examination). In *People v Whyte,* 165 Mich App 409, 413 (1988), the Court of Appeals held that the requisite showing that the defendant may have been incompetent to plead guilty was made when the presentence investigation reports containing the defendant's extensive history of mental illness were disclosed to the trial court.

"[W]here there is evidence of incompetency prior to the preliminary examination and counsel for defendant requests a determination of competency to stand trial, the examining magistrate should halt preliminary proceedings against a defendant and refer the defendant to the Center for Forensic Psychiatry for evaluation and recommendation. Upon receipt of the written report and recommendation, the district judge should conduct a hearing and make a determination of competency." *People v Thomas,* 96 Mich App 210, 218 (1980).

2. Ordering the Examination

The court must order the defendant to undergo a forensic examination upon a showing that the defendant may be incompetent to stand trial. MCR 6.125(C)(1) and MCL 330.2026(1). The examination must be conducted by personnel of the Center for Forensic Psychiatry or of another facility officially certified by the Department of Mental Health to perform examinations relating to the issue of incompetence to stand trial. *Id*. "On a showing of good

cause by either party, the court may order an independent examination of the defendant relating to the issue of competence to stand trial." MCR 6.125(D).

A forensic examination must be performed and a written report submitted to the court and parties within 60 days after the examination is ordered. MCL 330.2028(1). Pursuant to MCL 330.2028(2)(a)–(d), the report must contain the following elements:

> "(a) The clinical findings of the center or other facility.
>
> "(b) The facts, in reasonable detail, upon which the findings are based, and upon request of the court, defense, or prosecution additional facts germane to the findings.
>
> "(c) The opinion of the center or other facility on the issue of the incompetence of the defendant to stand trial.
>
> "(d) If the opinion is that the defendant is incompetent to stand trial, the opinion of the center or other facility on the likelihood of the defendant attaining competence to stand trial, if provided a course of treatment, within [15 months or one-third of the maximum sentence the defendant could receive if convicted, whichever is less]."

3. Conducting the Hearing

If a forensic examination is conducted, a competency hearing must be held within five days of the court's receipt of the report of the forensic examination or on conclusion of the proceedings, whichever is sooner. The court may grant an adjournment upon a showing of good cause. MCR 6.125(E) and MCL 330.2030(1). Although MCR 6.125(E) and MCL 330.2030(1) explicitly require the court to conduct a hearing upon receiving the report of the forensic examination, case law suggests that a hearing need be held only if there is evidence of incompetence and a request by the defendant. "If there be *evidence* of incompetence, the issue must be decided [at a hearing]." *People v Blocker,* 393 Mich 501, 510 (1975) (emphasis in original). In *Blocker,* an independent psychiatric examination of the defendant was conducted and a report returned, but the defendant did not request a hearing following the examination or present evidence of incompetence at trial. The Supreme Court held that the trial court did not err in failing to decide the issue at a formal hearing. *Id.* However, there is also authority for the proposition that the defendant is entitled to a hearing on statutory and constitutional grounds. See *Id.* at 519 (Swainson, J, dissenting), and *People v Lucas,* 393 Mich 522, 527 (1975). The trial court may base its decision solely on the report only if the parties choose not to present other evidence. *People v Livingston,* 57 Mich App 726, 735–36 (1975) ("[t]he parties must be expressly made aware that a competency hearing . . . is being held, that they have the right to present evidence, and that failure to exercise that right will result in a determination of competency . . .").

The defendant must appear at the hearing. MCL 330.2030(1). See also *People v Thompson,* 52 Mich App 262, 264–66 (1974) (because the defendant has a constitutional right to be present at the hearing, defense counsel may not waive that right by failing to contest the issue of the defendant's competence).

The Michigan Rules of Evidence apply during the hearing. MRE 1101(a). The court must determine the issue of competency based on evidence admitted at the hearing. Absent objection, the written forensic examination report is admissible at the hearing but is not admissible for any other purpose. The defense, prosecution, and court may present additional evidence at the hearing. MCL 330.2030(2) and (3).

If the court finds that the defendant is incompetent to stand trial and that there is not a substantial probability that the defendant, if provided a course of treatment, will attain competence to stand trial within 15 months or one-third of the maximum sentence the defendant could receive if convicted, whichever is less, the court may order the prosecuting attorney to petition for the involuntary civil commitment of the defendant. MCL 330.2031. If the court finds that there is a substantial probability that the defendant will attain competence to stand trial within these time limits, the court must order the defendant to undergo an appropriate course of treatment. MCL 330.2032(1).

4. Pretrial Motions While the Defendant Is Incompetent to Stand Trial

Pretrial motions made while the defendant is incompetent to stand trial must be heard and decided if the defendant's presence "is not essential for a fair hearing and decision on the motion." MCR 6.125(F)(1) and MCL 330.2022(2). The court may take testimony on a pretrial motion by the defense "if the defendant's presence could not assist the defense." MCR 6.125(F)(2).

5. Redetermining Competency

The court must conduct a hearing to redetermine the competence of the defendant at least every 90 days. MCL 330.2040. The person supervising the defendant's treatment must submit a report to the court, parties, and Center for Forensic Psychiatry every 90 days, whenever he or she believes that the defendant is competent to stand trial, or whenever he or she believes that there is a substantial probability that the defendant, with treatment, will attain competence to stand trial within 15 months or one-third of the maximum sentence the defendant could receive if convicted, whichever is less. MCL 330.2038(1)(a)–(c).

6. Dismissing the Charges Against Defendant

Pursuant to MCL 330.2044(1)(a)–(b), the court must dismiss the charges against the defendant in the following cases:

> "(a) When the prosecutor notifies the court of his intention not to prosecute the case; or
>
> "(b) Fifteen months after the date on which the defendant was originally determined incompetent to stand trial."

The 15-month period starts when the defendant is adjudicated incompetent, not when the defendant is committed for a diagnostic examination. *People v Davis,* 123 Mich App 553, 557 (1983). When an accused has been adjudicated incompetent for a total period of more than 15 months, regardless of whether the period was continuous, the charges against the defendant must be dismissed. *People* v *Miller*, 440 Mich 631, 633 (1992). However, if the defendant was charged with a life offense, the prosecuting attorney may petition at any time to refile the charge. For other offenses, the prosecuting attorney may petition to refile the charge within the period of time equal to one-third of the maximum possible sentence for the offense. MCL 330.2044(3). The court must grant the prosecuting attorney permission to refile charges if after a hearing it determines that the defendant is competent to stand trial. MCL 330.2044(4).

If the defendant is to be discharged or released, the person supervising the defendant's treatment may file a petition requesting the involuntary civil commitment of the defendant. MCL 330.2034(3).

7. Maintaining the Defendant's Competence Through the Use of Psychotropic Drugs

MCL 330.2020(2) states:

> "A defendant shall not be determined incompetent to stand trial because psychotropic drugs or other medication have been or are being administered under proper medical direction, and even though without such medication the defendant might be incompetent to stand trial. However, when the defendant is receiving such medication, the court may, prior to making its determination on the issue of incompetence to stand trial, require the filing of a statement by a treating physician that such medication will not adversely affect the defendant's understanding of the proceedings or his ability to assist in his defense."

In order to maintain the competence of the defendant, the trial court may order that defendant continue to take such medication during trial. MCL 330.2030(4). In *People* v *Hardesty*, 139 Mich App 124, 137 (1984), the Court of Appeals first held that MCL 330.2020(2) is constitutional. In addition, the Court held that the issue of whether MCL 330.2030(4) improperly interferes with a defendant's right to present an insanity defense must be decided on a case-by-case basis. *Hardesty, supra* at 145. A trial court must "balance the state's interest in safety and trial continuity . . . with the defendant's interest

in presenting probative evidence of insanity through his manner and demeanor on the witness stand . . . ." *Id.*

In limited circumstances, the United States Constitution permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant — in order to render that defendant competent to stand trial for serious, but nonviolent, crimes. *Sell v United States*, 539 US 166, 179 (2003). The *Sell* Court's decision was guided by two previous Supreme Court cases involving administering drugs to an inmate against the inmate's will. In *Washington v Harper*, 494 US 210, 221 (1990), the United States Supreme Court recognized that an individual possesses a "'significant' and constitutionally protected 'liberty interest' in avoiding the unwanted administration of antipsychotic drugs." However, forced administration in *Harper* was justified by "legitimate" and "important" state interests, including the constitutionally sound state interest of treating a prison inmate with serious mental illness who poses a danger to himself or others, when that treatment is in the inmate's best medical interests. In *Riggins v Nevada*, 504 US 127, 134–35 (1992), the Court indicated that only an "essential" or "overriding" state interest could overcome an individual's constitutional right to decline the administration of antipsychotic drugs. The *Riggins* Court cautioned that an analysis of the competing interests (the defendant's right to deny medication and the state's interest) must include determinations that the medication was "medically appropriate" and "essential" to the safety of the defendant or others.

On the facts of the *Sell* case, where the defendant's offenses were primarily nonviolent, but where the defendant verbally threatened to harm a specific individual, the *Sell* Court held:

> "[T]he Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." *Sell, supra*.

The *Sell* Court predicted that cases permitting the forced administration of antipsychotic medication *solely* for trial-competence purposes would be rare due to the government's high burden of proof to justify medication solely for the sake of the defendant's competence to stand trial. The Court suggested that alternative grounds in support of forced drug administration (health and safety issues, potential for harming self or others, etc.) be explored before attempting to obtain permission on the basis of the defendant's competence to stand trial. *Sell, supra,* 539 US at 180–82.

6.15 Motion for Compulsory Process of a Defense Witness or Appointment of an Expert Witness at Public Expense

Moving Party: Defendant

Burden of Proof: Defendant has the burden of showing that a witness's testimony will be material and favorable to the defense, that defendant cannot safely proceed to trial without the testimony of the witness, and that defendant does not have the funds necessary to pay for subpoenaing the witness. MCL 775.15.

Discussion

A fundamental element of due process is a defendant's right to present witnesses in his or her favor. US Const, Am VI, *Washington v Texas,* 388 US 14, 19 (1967), Const 1963, art 1, § 20, and MCL 763.1. Fundamental fairness requires that the state not deny indigent defendants "'an adequate opportunity to present their claims fairly within the adversary system.'" *People v Leonard,* 224 Mich App 569, 580–81 (1997), quoting *Ross v Moffitt,* 417 US 600, 612 (1974). An indigent defendant must demonstrate that the witness or expert would be of assistance to the defense and that denial of the request would result in a fundamentally unfair trial. *Leonard, supra* at 582, quoting *Moore v Kemp,* 809 F2d 702, 709 (CA 11, 1987).

The requirement in MCL 763.1 that an accused "shall have the right to produce witnesses and proofs in his favor" must not be superimposed on MCL 775.15. *People v Morris,* 12 Mich App 411, 416–17 (1968). Instead, applications to summon witnesses or appoint experts at the state's expense are addressed to the sound discretion of the trial court. MCL 775.15 and *People v Thomas,* 1 Mich App 118, 125 (1965).

Where the defendant satisfied the mandate of *Ake v Oklahoma*, 470 US 68, 83 (1985),* by providing the trial court with specific facts in support of the assertion that his sanity was "likely to be a significant factor at trial," the court erred in denying the defendant's request for independent expert psychiatric assistance at trial. *Powell v Collins*, 332 F3d 376, 392 (CA 6, 2003). In *Powell*, the Court held that an indigent defendant's constitutional right to expert psychiatric assistance was not satisfied—at either the guilt or the penalty phases of a capital case—by the trial court's appointment of a "neutral" clinician available to both parties. See *People v Stone,* 195 Mich App 600, 606 (1992) (appointed psychiatrist must be independent of prosecution but need not be of defendant's own choosing).

*See Section 6.33, below, for further discussion of the *Ake* case.

*Some statutes require the court to appoint persons to assist the defense. See, e.g., MCL 768.20a(3), discussed in Section 6.33 (an indigent defendant is entitled to an independent psychiatric evaluation when preparing an insanity defense), and MCL 775.19a (court must appoint foreign language interpreter).

The trial court must subpoena defense witnesses or appoint expert witnesses at public expense only if the defendant cannot otherwise proceed safely to trial. MCL 775.15. In *People v Rich,* 110 Mich App 659, 663–64 (1981), the Court of Appeals held that the trial court did not abuse its discretion in refusing to subpoena requested witnesses where their proposed testimony was irrelevant to any defense to the charged offense. However, the Michigan Supreme Court reversed the Court of Appeals' decision, finding that the trial court erred in allowing the prosecutor to argue the implications of the defendant's failure to produce witnesses where the prosecutor had successfully opposed the defendant's motion for compulsory process. *People v Rich,* 414 Mich 961 (1982). A defendant must "show a nexus between the facts of the case and the need for an expert [witness]." *People v Jacobsen,* 448 Mich 639, 641 (1995). See also *People v Miller,* 165 Mich App 32, 47–48 (1987) (the trial court properly denied defendant's request for an expert to testify regarding the credibility of children in child sexual abuse cases because such testimony is inadmissible).*

In *People v Tanner*, 469 Mich 437, 442–44 (2003), the Michigan Supreme Court reversed the holding of the Court of Appeals in *People v Tanner*, 255 Mich App 369 (2003). The Michigan Supreme Court found that because the prosecutor's DNA evidence offered at trial was entirely exculpatory, the defendant could not show that she could not safely proceed to trial without a DNA expert.

MCL 775.15 refers to "witnesses within the jurisdiction of the court." To implement a defendant's constitutional and statutory rights to compulsory process when a material witness resides outside of the state, Michigan has adopted the "uniform act to secure the attendance of witnesses from without a state in criminal proceedings," MCL 767.91 et seq. (the Uniform Act). *People v McFall,* 224 Mich App 403, 407–08 (1997). To properly invoke the procedures under the Uniform Act, a defendant must "(1) designate the proposed witness' location with a reasonable degree of certainty; (2) file a timely petition; and (3) make out a *prima facie* case that the witness' testimony is material." *Id.* at 409.

Cases interpreting the Uniform Act have held that a defendant's unsupported assertions that the witness's testimony is material or necessary are insufficient to establish a *prima facie* case of materiality. Instead, a defendant must present an affidavit of the proposed witness or other competent evidence, such as the proposed witness's statements to police. *Id.* at 410, and *People v Williams,* 114 Mich App 186, 201–02 (1982).

6.16 Motion to Suppress Evidence Obtained as a Result of an Illegal Prearraignment Detention

Moving Party: Defendant

Burden or Proof: The defendant must come forward with evidence that the evidence in question was obtained as a result of a statutorily unlawful detention. If the defendant does so, the prosecuting attorney has the burden of proving the admissibility of the evidence. *People v Jordan,* 149 Mich App 568, 577 (1986).

Discussion

Following a warrantless arrest for a felony, the peace officer must take an adult accused before a magistrate for arraignment "without unnecessary delay." MCL 764.13 and MCL 764.26. If a juvenile less than 17 years of age is taken into custody, the juvenile must "immediately" be taken before the Family Division of the Circuit Court of the county where the offense was allegedly committed. MCL 764.27. However, if the prosecutor has authorized the filing of a complaint in District Court under the "automatic" waiver statute, MCL 600.606, the juvenile need not be taken to the Family Division following apprehension but to the District Court for arraignment. *People v Brooks,* 184 Mich App 793, 797–98 (1990), *People v Spearman,* 195 Mich App 434, 443–45 (1992), overruled on other grounds 443 Mich 23, 43 (1993), MCR 6.907(A), and MCR 6.909(A).

In *Riverside County v McLaughlin,* 500 US 44, 56–57 (1991), the United States Supreme Court held that a delay in a judicial finding of probable cause for more than 48 hours is presumptively unreasonable. In addition, a judicial determination of probable cause within 48 hours may violate the Fourth Amendment if any delay is used to gather additional evidence to justify the arrest, is motivated by ill will against the accused, or is otherwise unreasonable. *Id.* at 56. In *People v Manning,* 243 Mich App 615, 638 (2000), the Court of Appeals held that violations of the standards set forth in *Riverside County* do not automatically render a defendant's confession involuntary. Instead, trial courts should consider such violations as one factor in the analysis set forth in *People v Cipriano,* 431 Mich 315 (1988).

In *Cipriano*, *supra* at 333–34, the Michigan Supreme Court held that "unnecessary delay" in bringing the accused before a magistrate for arraignment is only one factor in determining whether a confession given during the delay is voluntary:

> "[W]e believe 'unnecessary delay' in arraignment is only one of the factors that should be considered in evaluating the voluntariness of a confession. The test of voluntariness* should be whether, considering the totality of all the surrounding circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker,' or whether the accused's will has been overborne and his capacity for self-determination critically impaired. . . .'" (Citation omitted.)

*See Section 6.17, below, for the factors to consider when determining the voluntariness of a confession.

The focus of the trial court should be on what occurred during the delay and its effect on the accused, not only on the length of the delay. However, prolonged unexplained delay should be a signal to the trial court that the voluntariness of a confession obtained during the delay may have been impaired. *Id.* at 334–35.

*See Section 6.17, below, for a list of the factors to be applied in determining the voluntariness of a juvenile's confession.

Similarly, in cases involving juveniles, a violation of the "immediacy rule," MCL 764.27 and MCR 3.934, does not mandate exclusion of a confession obtained following a violation of the rule, but is merely one factor to consider in determining the voluntariness of the confession. *People v Good*, 186 Mich App 180, 186–88 (1990) (the Court of Appeals held that a "totality of the circumstances" analysis applies, under which violation of the "immediacy rule" is one factor to consider in determining the voluntariness of a juvenile's confession), *People v Givans,* 227 Mich App 113, 121 (1997), and *In re SLL,* 246 Mich App 204, 209 (2001).*

Where an unnecessary delay has occurred, admissions or confessions obtained during the delay must be excluded if the delay was employed as a tool to extract the statements. *People v White,* 392 Mich 404, 424 (1974), and *People* v *Mallory*, 421 Mich 229, 240–41 (1984). Similarly, in cases involving juveniles, a confession is inadmissible if the delay in bringing the juvenile before the "juvenile court" is used as a tool to extract a confession. *People v Strunk,* 184 Mich App 310, 314–22 (1990).

The exclusionary rule also applies to physical evidence obtained from a detainee when unlawful detention was employed as a tool to directly procure that evidence, and to any other evidence that would not have been discovered but for that direct procurement. *Mallory*, *supra* at 240–41.

6.17 Motion to Suppress an Involuntary Confession

Moving Party: Defendant

Burden of Proof: The prosecutor has the burden of proving that the confession was voluntarily given and not the product of coercion. *People v White,* 401 Mich 482, 494 (1977). The voluntariness of a defendant's confession must be established by a preponderance of the evidence. *Lego v Twomey,* 404 US 477, 489 (1972) (the prosecutor must prove by a preponderance of the evidence that a defendant's confession was voluntary although states are free to set a higher standard of proof), and *People v Sears,* 124 Mich App 735, 738 (1983) (the Court of Appeals declined to require the prosecutor to prove the voluntariness of a confession beyond a reasonable doubt).

Discussion

1. General Standard of "Voluntariness"

The standard for voluntariness of a confession is whether it is "the product of an essentially free and unconstrained choice by its maker," or whether the accused's "will has been overborne and his capacity for self-determination critically impaired." *Culombe v Connecticut,* 367 US 568, 602 (1961), and *People v Peerenboom,* 224 Mich App 195, 198 (1997).

Although a defendant's mental condition may be relevant to the voluntariness of a confession, coercive police conduct must be present to support a conclusion that a confession is involuntary within the meaning of the federal constitution. *Colorado v Connelly,* 479 US 157, 167 (1986) (mentally ill defendant's confession freely offered to police did not violate the 14th Amendment's Due Process Clause). See also *People v Fike,* 228 Mich App 178, 182 (1998) (citing *Connelly,* the Court of Appeals found no error where the police did not exploit the defendant's lack of intelligence). Where a defendant claims that police conduct at the time of arrest rendered a subsequent confession involuntary, there must be a sufficient causal link between the police conduct and confession. *People v Wells,* 238 Mich App 383, 386–90 (1999) (factors to consider when evaluating the connection between an alleged beating by police at time of arrest and a subsequent confession).

A promise of leniency is merely one factor to be considered in evaluating the voluntariness of a defendant's or juvenile's confession. *People v Conte,* 421 Mich 704, 751, 761–62 (1984) (in a 4-3 decision, the Michigan Supreme Court rejected a rule that rendered a confession inadmissible if it was induced by a promise of leniency). In *People v Givans,* 227 Mich App 113, 119–20 (1997), the Court of Appeals held that a police officer's promise to mention the 16-year-old suspect's cooperation in a report to the prosecutor did not constitute a promise of leniency. Promises to help the accused and statements that cooperation will "make things go easier for the accused" or be taken into account at sentencing are not improper promises of leniency. *People v Ewing (On Remand),* 102 Mich App 81, 85–86 (1980), and *People v Carigon,* 128 Mich App 802, 810–12 (1983).

Similarly, courts have found that police misrepresentation of facts is one factor to be considered but does not alone render a confession involuntary. *Frazier v Cupp,* 394 US 731, 740 (1969), *Ledbetter v Edwards,* 35 F3d 1062, 1069 (CA 6, 1994), and *People v Hicks,* 185 Mich App 107, 113 (1990). See also *Givans, supra* at 122–23 (officer erroneously implying that a 16-year-old suspect's fingerprints were found at the crime scene did not render an otherwise voluntary confession involuntary).

2. Disputes Regarding Whether a Confession or Statement Was Made

The determination of whether a statement was made is separate from a determination of voluntariness. *People v Spivey,* 109 Mich App 36, 37 (1981). Although both issues are questions of fact which would normally be left to the jury to decide, the Michigan Supreme Court in *People v Walker (On Rehearing),* 374 Mich 331 (1965), delegated the determination of voluntariness to the trial court. However, all other fact issues relevant to the weight and credibility of a defendant's statement are left to the jury. *Id.* at 337, and *People v Robinson,* 386 Mich 551, 557–58 (1972).

The Court of Appeals has taken two approaches in cases involving claims that the police fabricated a confession and coerced the accused to sign it. In *People v Weatherspoon,* 171 Mich App 549, 553–55 (1988), the trial court was found to have justifiably denied a *Walker* hearing at trial to a defendant who denied making the confession at issue in the case. After the confession was admitted into evidence at trial and the defendant found guilty, however, the Court of Appeals remanded the case to the trial court for a hearing on the voluntariness of the confession. The jury's guilty verdict implied its finding that the defendant had made the confession; that determination having been made, the defendant was entitled to a hearing on whether the confession was voluntary. In *People v Neal,* 182 Mich App 368, 372 (1990), the Court of Appeals disapproved of the approach taken in *Weatherspoon.* In *Neal,* the Court held that where a defendant claims that he or she involuntarily signed a statement that was fabricated by police, a *Walker* hearing is required before admission of the statement at trial. If the court finds that the defendant voluntarily made the statement, the issue of whether the police fabricated it may be presented to the jury. However, if the court finds that the statement was involuntary, the statement is inadmissible. See also *People v Neal,* 436 Mich 1201 (1990) (the Michigan Supreme Court declined to order a conflict resolution panel to resolve the conflict between *Weatherspoon* and *Neal*).

3. Evidentiary Hearing Procedures

A defendant has the right to an evidentiary hearing upon request when he or she challenges the admissibility of evidence on constitutional grounds and a factual dispute exists. *People v Wiejecha,* 14 Mich App 486, 488 (1968), citing *Jackson v Denno,* 378 US 368 (1964), *People v Reynolds,* 93 Mich App 516, 519 (1979), and *People v Johnson,* 202 Mich App 281, 285–87 (1993). Where "a defendant's mental, emotional or physical condition, evidence of police threats, or other obvious forms of physical and mental duress," or other alerting circumstances, clearly and substantially raise a question about the voluntariness of the confession, the court may be required to conduct a hearing without a request by the defendant. *People v Hooks,* 112 Mich App 477, 480, 482 (1982), and *People v Ray,* 431 Mich 260, 271 (1988).

The trial judge alone must make a determination at a separate evidentiary hearing of the voluntariness of a confession. *Jackson, supra,* 378 US at 395,

and *Walker, supra* at 336–38. The mere hearing of legal arguments is insufficient. *People v Wright,* 6 Mich App 495, 502 (1967). The purpose of the hearing is to determine whether a statement was made voluntarily, in light of the totality of the circumstances surrounding the statement. *People v Crawford,* 89 Mich App 30, 32 (1979), *People v Stricklin,* 162 Mich App 623, 635–36 (1987), and *People v Good*, 186 Mich App 180, 186–90 (1990) (totality-of-the-circumstances test applies to cases involving juveniles). The defendant may testify for the limited purpose of making a record of his or her version of the facts and circumstances under which the confession was obtained without waiving the right to decline to take the stand at trial. *Walker, supra* at 338, and MRE 104(d).

The sole issue in a hearing to determine the voluntariness of a confession is whether the confession was coerced. "Whether [the confession] is true or false is irrelevant; indeed, such an inquiry is forbidden. The judge may not take into consideration evidence that would indicate that the confession, though compelled, is reliable, even highly so." *Lego, supra,* 404 US at 484 n 12.

If the court determines that the confession was voluntary, the issue of voluntariness is not submitted to the jury; jury consideration is limited to the weight and credibility of the defendant's statements. *Walker, supra* at 337–38. Involuntary confessions must not be used to establish guilt or to impeach the defendant's credibility if he or she testifies at trial. *Mincey v Arizona,* 437 US 385, 398 (1978), and *People v Reed*, 393 Mich 342, 356 (1975). When the first of two confessions was involuntary, the second confession is admissible only if intervening events, such as consultation with counsel, broke any connection between the confessions, and if the second confession was itself both voluntary and made by the defendant after sufficient explanation and consideration of his rights. *People v Bieri,* 153 Mich App 696, 706–12 (1982).

There is no need to conduct an evidentiary hearing to determine the voluntariness of the defendant's statements unless he or she has confessed. *People v Wytcherly,* 172 Mich App 213, 219 (1988). "If the fact admitted necessarily amounts to a confession of guilt, it is a confession. If, however, the fact admitted does not of itself show guilt but needs proof of other facts, which are not admitted by the accused, in order to show guilt, it is not a confession but an admission." *People v Porter,* 269 Mich 284, 290 (1934). See also *People v Drielick,* 56 Mich App 664, 668 (1974), aff'd 400 Mich 559 (1977) (the defendant's statement that he killed the victim was an admission, not a confession, since other facts were necessary to establish murder). Admissions by a party are non-hearsay. MRE 801(d)(2).*

*If a violation of *Miranda* is alleged, the trial court must conduct a hearing regardless of whether the statements in question constitute admissions or confessions. *Miranda v Arizona,* 384 US 436, 476–77 (1966). *Miranda* is discussed in Section 6.18, below.

4. Factors to Determine Whether a Confession Was Voluntary

In determining whether a confession is voluntary, the trial court should examine the totality of the circumstances surrounding the making of the statement, including the following factors:

1) the age of the accused;

2) the accused's lack of education or intelligence level;

3) the extent of the accused's previous experience with the police;

4) the repeated and prolonged nature of the questioning;

5) the length of the detention of the accused before he or she gave the statement in question;

6) the lack of any advice to the accused of his or her constitutional rights;

7) whether there was an unnecessary delay in bringing the accused before a magistrate before he or she gave the confession;

8) whether the accused was injured, intoxicated or drugged, or in ill health when he or she gave the statement;

9) whether the accused was deprived of food, sleep, or medical attention;

10) whether the accused was physically abused; and

11) whether the suspect was threatened with abuse. *People* v *Cipriano*, 431 Mich 315, 334 (1988)

"The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id.*

Confessions obtained after a defendant has been confronted with evidence that is later ruled to have been illegally seized are inadmissible because "[t]he use of the illegally seized evidence undoubtedly had a coercive influence on defendant's decision to confess and consequently it must be considered involuntarily made." *People v Douglas,* 50 Mich App 372, 379–80 (1973), and *Fahy v Connecticut,* 375 US 85, 89 (1963).

A "non-exhaustive" list of factors to be used to determine whether a juvenile's statement was voluntarily made are:

*See Section 6.18, below, for discussion of *Miranda.*

1) whether *Miranda* rules were complied with, and whether the juvenile clearly understood and waived his or her *Miranda* rights;*

2) the degree of police compliance with statutory and court rule requirements;

3) the presence of an adult parent, custodian, or guardian;

4) the juvenile's personal background;

5) the juvenile's age, education, and intelligence level;

6) the extent of the juvenile's prior experience with police;

7) the length of the detention prior to the statement;

8) the repeated or prolonged nature of the questioning; and

9) whether the juvenile was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention. *Good, supra* at 186–90. See also *People v Rode,* 196 Mich App 58, 69–70 (1992) (discussing the importance of the presence of a parent, guardian, or custodian), and *People v Hall,* 249 Mich App 262, 269 (2002) (violation of MCL 764.27 and former 5.934 did not warrant suppression where 15-year-old defendant was reasonably intelligent and had prior experience with police).

Provisions of the Juvenile Code and related court rules require the police to immediately take a juvenile to the Family Division of Circuit Court when he or she is taken into custody. MCL 712A.14 and MCR 3.933 and 3.934. This requirement is also stated in MCL 764.27. Because the "automatic waiver" statute, MCL 600.606, divests the Family Division of jurisdiction and gives the Criminal Division original jurisdiction over specified juvenile violations if the prosecutor files a complaint and warrant instead of a petition, juveniles charged under this statute need not be taken before the "juvenile court." MCR 6.907(A), 6.909(A), *People v Spearman,* 195 Mich App 434, 443–45 (1992), overruled on other grounds 443 Mich 23, 43 (1993), and *People v Brooks,* 184 Mich App 793, 797–98 (1990). Often the juvenile who becomes the subject of the "automatic" waiver procedure is initially detained on a juvenile complaint, upon authorization to detain from a court representative (usually the referee on duty). Typically, when the juvenile is apprehended at night, the police present the complaint to the prosecutor the next morning, and the prosecutor then writes the criminal complaint and warrant rather than a juvenile petition. The juvenile is then arraigned in district court, and the juvenile case is "closed."

6.18 Motion to Suppress Confession Because of a *Miranda* Violation

Moving Party: Defendant

Burden of Proof: Prior to admission of a defendant's statements in the prosecutor's case-in-chief, the prosecutor must make an affirmative showing that *Miranda* warnings were given prior to a custodial interrogation and that a waiver was properly obtained. *Miranda v Arizona,* 384 US 436, 444 (1966), and *People v Arroyo,* 138 Mich App 246, 249–50 (1984). In *Miranda, supra,* the United States Supreme Court held that the prosecutor must present evidence that the defendant voluntarily, knowingly, and intelligently waived his or her privilege against self-incrimination and rights to consult with and have counsel present during a custodial interrogation. If the defendant claims

that he or she did not validly waive *Miranda* rights, the prosecutor has the burden of proving by a preponderance of the evidence that there was a voluntary, knowing, and intelligent waiver of those rights. *Colorado v Connelly,* 479 US 157, 168 (1986), *People v Cheatham,* 453 Mich 1, 27 (1996), and *People v Daoud,* 462 Mich 621, 634 (2000). The court must examine the totality of the circumstances surrounding the interrogation when evaluating the validity of a purported waiver of *Miranda* rights. *Fare v Michael C,* 442 US 707, 724–25 (1979).

Discussion

Miranda, supra, and cases interpreting its requirements govern the admissibility in state courts of statements obtained during custodial interrogation. *Dickerson v United States,* 530 US 428, 432 (2000) (the *Miranda* procedures are required by the Fifth Amendment of the federal constitution; therefore *Miranda* could not be overruled by an act of Congress). The privilege against self-incrimination found in the Michigan Constitution is no different than the privilege found in the federal constitution. US Const, Am V, 1963 Const, art 1, § 17, and *Paramount Pictures Corp v Miskinis,* 418 Mich 708, 726 (1984).

The *Miranda* rules have been applied to juveniles. See *Fare, supra,* 442 US at 717 n 4, 725 (assuming without deciding that *Miranda* applies to cases involving juveniles, a juvenile's request to speak with his probation officer did not constitute an invocation of the juvenile's rights to counsel and to remain silent), *People v Anderson,* 209 Mich App 527, 530–35 (1995) (juvenile corrections officer is not a law enforcement officer for *Miranda* purposes), and *People v Black,* 203 Mich App 428, 430 (1994) (in an "automatic" waiver case, a juvenile's confession was admissible, where the juvenile initiated a conversation with police after invoking her *Miranda* rights).

1. When an Evidentiary Hearing Must Be Conducted

A separate evidentiary hearing must be conducted by the court when the defendant challenges the admissibility of his or her statements on the basis of an alleged *Miranda* violation. *Arroyo, supra* at 249-250.

2. When *Miranda* Warnings Must Be Given—Custody and Interrogation Requirements

Miranda warnings must be given only in situations involving "custodial interrogation." Custodial interrogation means "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *People* v *Hill*, 429 Mich 382, 387 (1987), quoting *Miranda, supra,* 384 US at 444.*

*See also *Traffic Benchbook—Third Edition* (MJI, 2005), Vol 3, Section 2.2(E), for further discussion.

- **Custody**

Under both federal and Michigan law, *Miranda* warnings must be given to a suspect prior to questioning **only** when the suspect is in custody or otherwise deprived of freedom of action in any significant way, not at the time a person becomes the focus of an investigation. *Oregon v Mathiason,* 429 US 492, 495 (1977), *Hill, supra* at 391–99, and *People v Peerenboom,* 224 Mich App 195, 197–98 (1997). Warnings need not be given unless the person is arrested or deprived of his or her freedom to a degree associated with formal arrest. *California v Beheler,* 463 US 1121, 1125 (1983), *Terry v Ohio*, 392 US 1 (1968), *People v Chinn*, 141 Mich App 92, 96 (1985) (warnings not required during routine traffic stop), and *People v Edwards,* 158 Mich App 561, 564 (1987) (warnings not required during routine traffic stop where officer asks if there are weapons in the car). "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. *Stansbury v California,* 511 US 318, 323 (1994). See also *People v Zahn,* 234 Mich App 438, 449 (1999) (interrogating officer's unspoken intent to prevent the defendant from leaving the apartment where the interrogation took place was improperly considered by the trial court).

- **Interrogation**

In addition to the requirement that a person be in custody, *Miranda* warnings must be provided **only** if a person is subjected to "interrogation." "Interrogation" means "express questioning [or] any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response from the subject." *Anderson, supra* at 532, citing *Rhode Island v Innis,* 446 US 291, 301 (1980). See also *People v Fisher,* 166 Mich App 699, 708 (1988), rev'd on other grounds 442 Mich 560 (1993), and cases cited therein (placing incriminating evidence in the suspect's view is generally not "interrogation"). Even where a person is in custody, spontaneous and volunteered statements are not inadmissible due to a failure to provide *Miranda* warnings. *People v Raper,* 222 Mich App 475, 479–80 (1997).

- **Exceptions to *Miranda* Warning Requirement**

The police need not give *Miranda* warnings prior to making on-the-scene inquiries to determine whether an offense has been committed. *People v Ingram,* 412 Mich 200, 204–05 (1981). Moreover, police need not give *Miranda* warnings to a suspect who is in custody when the officer's questions are prompted by a reasonable concern for public safety. *New York v Quarles,* 467 US 649, 655–56 (1984). For the "public safety exception" to *Miranda* requirements to apply, "the police inquiry must have been an objectively reasonable question necessary to protect the police or the public from an immediate danger." *People v Attebury,* 463 Mich 662, 671 (2001). The "public safety exception" applies to questions necessary to protect *the police*

and the general public but does not apply to investigatory questions concerning the underlying offense. *Id.*

3. Invocation of *Miranda* Rights

A suspect's request for an attorney or assertion of the right to remain silent must be affirmative, unequivocal, and unambiguous. *Davis v United States,* 512 US 456, 459 (1994) (suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney"), *People v Tierney*, 266 Mich App 687, 711 (2005) (defendant's statements, "Maybe I should talk to an attorney" and "I might want to talk to an attorney" were equivocal and did not properly invoke his right to counsel), *United States v Suarez,* 263 F3d 468, 482–83 (CA 6, 2001) (suspect's acknowledgment that a third party had retained counsel for the suspect did not constitute an affirmative assertion of the right to have counsel present), *People v Granderson,* 212 Mich App 673, 676–78 (1995) (suspect's statement that he would need an attorney in the future held insufficient to invoke *Miranda* right), *Abela v Martin*, 380 F3d 915, 925–26 (CA 6, 2004) (defendant's request for counsel was unequivocal where defendant "named the specific individual with whom he wanted to speak and then showed [the police officer] the attorney's business card"), and *McGraw v Holland,* 257 F3d 513, 518 (CA 6, 2001) (suspect's assertion that she did not want to talk about the rape held to be unambiguous invocation of her right to silence regarding the alleged rape). When determining whether a suspect has invoked the rights to consult with and have counsel present during interrogation, courts must evaluate the objective circumstances surrounding the interview. *Davis, supra,* 512 US at 458, and *People v Adams,* 245 Mich App 226, 237 (2001).

In *Miranda, supra,* 384 US at 473–74, the Court stated the following regarding the required procedure following the invocation of a suspect's rights:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent."

A suspect's invocation of his or her right to silence must be "scrupulously honored." *Michigan v Mosley,* 423 US 96, 103 (1975), quoting *Miranda, supra,* 384 US at 479.

4. Interrogation After *Miranda* Rights Have Been Invoked

The United States Supreme Court has stated that if police "scrupulously honored" a suspect's prior invocation of his or her right to remain silent, they may subsequently question the suspect "only after the passage of a significant period of time and the provision of a fresh set of warnings, and restrict[ing] the second interrogation to a crime that had not been a subject of the earlier interrogation." *Mosley, supra,* 423 US at 106. The Michigan Court of Appeals has held that the police are not limited to questioning the suspect regarding a separate offense if the police have otherwise followed the requirements set forth in *Mosley. People v Slocum (On Remand),* 219 Mich App 695, 702 (1996).

If the suspect has invoked his or her right to consult with and have counsel present during interrogation, the suspect must not be subsequently interrogated unless he or she initiates subsequent communication, exchanges, or conversations with police. *Edwards v Arizona,* 451 US 477, 484–85 (1981), and *People v Paintman,* 412 Mich 518, 524–26 (1982). "When counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Minnick v Mississippi,* 498 US 146, 153 (1990). But see *People v Kowalski,* 230 Mich App 464, 482 (1998) (asking the accused whether he "would still like to talk to an attorney" did not constitute police-initiated interrogation). After the suspect has invoked the *Miranda* right to counsel, the police may not interrogate the suspect regarding a different offense. *Arizona v Roberson,* 486 US 675, 677–78 (1988). Although the suspect may reinitiate an exchange with the police, such a reinitiation does not alone constitute a waiver of the right to have counsel present. *Oregon v Bradshaw,* 462 US 1039, 1044 (1983) (plurality opinion), and *People v Myers,* 158 Mich App 1, 11–12 (1987) (the police must honor the accused's request for counsel before a court may find that subsequent statements by the accused constituted a waiver of the right to counsel).

Edwards, supra does not apply to a suspect who was not in continuous custody during the time between the suspect's first interrogation, at which he invoked his right to counsel and denied involvement in the crime, and the suspect's second interrogation 11 days later, at which the suspect acknowledged and waived his right to counsel and implicated himself in the crime. *People v Harris*, 261 Mich App 44, 54–55 (2004).

5. Limited Invocations of *Miranda* Rights

A suspect's request for an attorney before making a written statement does not constitute an invocation of his or her right to counsel with regard to oral statements made to police. *Connecticut v Barrett,* 479 US 523, 529 (1987). Similarly, a suspect may choose to discuss certain subjects but assert his or her right to silence regarding others, or may deal with the police through counsel concerning certain subjects but directly concerning other subjects. *People v Adams,* 245 Mich App 226, 230–34 (2001) (suspect's limited request

for counsel in conjunction with questions concerning motive allowed police to continue to question him concerning other topics), *People v Spencer,* 154 Mich App 6, 13 (1986) (suspect's assertion that he wanted to limit his answers was not an unequivocal invocation of his right to remain silent), and *People v Jackson,* 158 Mich App 544, 550–51 (1987) (defendant's assertion that "he didn't want to say anything about the gun" held a limitation on the subject matter of interrogation or, at best, an equivocal assertion of the right to remain silent).

6. The Requirements for a Valid Waiver of *Miranda* Rights

To establish a valid waiver of *Miranda* rights, the prosecutor must prove that the suspect voluntarily, knowingly, and intelligently waived those rights. *Miranda, supra,* 384 US at 444, 475. A waiver is valid if the "suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction . . . ." *Moran v Burbine,* 475 US 412, 422 (1986). Coercive police conduct must be present to support a conclusion that a waiver of *Miranda* rights is involuntary. *Connelly, supra,* 479 US at 165, 169–70, and *People v Howard,* 226 Mich App 528, 538 (1997). When determining whether a waiver was knowing and intelligent, the court must conduct a subjective inquiry into the suspect's level of understanding of his or her rights, irrespective of police behavior. *Cheatham, supra* at 26. However, "a suspect need not understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him." *Id.* at 28. See also *Daoud, supra* at 636–39, and *In re Abraham,* 234 Mich App 640, 646–55 (1999) (11-year-old defendant knowingly and intelligently waived his *Miranda* rights).

A defendant who is intoxicated and claims to be suicidal may make a valid waiver of his or her *Miranda* rights as long as the totality of the circumstances supports a finding that the waiver was voluntary and that it was made knowingly and intelligently. *People v Tierney*, 266 Mich App 687, 708–09 (2005).

Waiver of *Miranda* rights need not be explicit but may be determined by examining the surrounding circumstances, "including the background, experience, and conduct of the accused." *North Carolina v Butler,* 441 US 369, 375 (1979). In *Butler, supra,* 441 US at 373, the United States Supreme Court stated as follows:

> "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda,* mere silence is not enough.

> That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated."

A suspect's refusal to sign a written "advice of rights and waiver form" does not, by itself, preclude a valid waiver. *Butler, supra,* 441 US at 370–71, and *People v Wirth,* 87 Mich App 41, 46 (1978).

"[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards, supra,* 451 US at 484.

The "valid waiver rule" of *Edwards* does not apply to the subsequent interrogation of a suspect who was not held in continuous custody between his first interrogation, at which he requested counsel and denied involvement in the crime, and his second interrogation 11 days later, at which he acknowledged his right to counsel and implicated himself in the crime. *Harris*, *supra* at 54. Notwithstanding the time that passed between interrogations in *Harris* and the fact that the defendant was not held in custody during that time, the Court found that the prosecution had established by a preponderance of the evidence that the defendant executed a valid waiver of his right to counsel at the second interrogation. *Id.* at 55.

The police must inform a suspect "that a retained attorney is immediately available to consult with him," and the failure to do so precludes a knowing and intelligent waiver of the suspect's *Miranda* rights. *People v Bender,* 452 Mich 594, 597, 620–21 (1992). See also *Burbine, supra,* 475 US at 425–28 (although the federal constitution does not require police to notify a suspect that a retained attorney is attempting to reach the suspect, states are free to adopt different requirements). It should be noted that only three justices based the rule in *Bender* on Const 1963, art 1, § 17; however, four justices supported the prophylactic rule stated above. The Court of Appeals has held that an attorney's phone contact with the police is sufficient to invoke the rule set forth in *Bender. People v Leversee,* 243 Mich App 337, 343–47 (2000).

7. Use of Confessions Obtained in Violation of *Miranda*

A defendant may be impeached with a confession that was obtained in violation of *Miranda* if the confession was otherwise voluntary. *Harris v New York,* 401 US 222, 226 (1971), and *People v Stacy,* 193 Mich App 19, 23–25 (1992).

The fruits of a *Miranda* violation are admissible if the defendant's statements were otherwise voluntary. Thus, physical evidence, the defendant's subsequent confession, or another witness's testimony discovered as a result of a statement obtained in violation of *Miranda* is admissible if the statement is otherwise voluntary. *United States v Patane,* 542 US 600, 636–37 (2004) (plurality opinion) (physical evidence admissible), *Oregon v Elstad,* 470 US 298, 306–07 (1985) (defendant's subsequent voluntary confession obtained after proper waiver of *Miranda* rights admissible), *Michigan v Tucker,* 417 US 433, 445–46 (1974) (witness's testimony admissible where witness's identity was discovered as a result of defendant's unwarned statement), *People v Kusowski,* 403 Mich 653, 660–62 (1978) (relying on *Tucker*), and *United States v Crowder,* 62 F3d 782, 786 (CA 6, 1995). However, in a plurality decision addressing a police policy of deliberately omitting *Miranda* warnings, obtaining a confession, and then administering proper *Miranda* warnings and obtaining a purported waiver, the U.S. Supreme Court concluded that an accused's post-warning statement was inadmissible. *Missouri v Seibert,* 542 US 600, 604 (2004). Whether a failure to provide *Miranda* warnings is purposeful or not, a reviewing court should ask if "it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." *Seibert, supra,* 542 US at 611–12. The *Seibert* Court focused on whether the two interrogations were close in time and similar in content. "[W]hen *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" *Seibert, supra,* 542 US at 613–14, quoting *Burbine, supra,* 475 US at 424.

6.19 Motion to Suppress Confession for Violation of Sixth Amendment Right to Counsel

Moving Party: Defendant

Burden of Proof: To use in its case-in-chief a confession deliberately elicited following arraignment, the prosecuting attorney must prove that police obtained a voluntary, knowing, and intelligent relinquishment of the Sixth Amendment right to counsel before they interrogated the accused. *Brewer v Williams,* 430 US 387, 410 (1977) (Powell, J, concurring), and *Patterson v Illinois,* 487 US 285, 292 (1988).

Discussion

The Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The relevant provision of the state constitution is virtually identical. See Const 1963, art 1, § 20. In *Massiah v United States,* 377 US 201, 205–06 (1964), the United States Supreme Court held that the use as substantive evidence of an accused's confession

deliberately elicited by federal agents after the accused had been indicted but in the absence of counsel violated the Sixth Amendment right to counsel.

Rights to counsel are protected under both the Fifth and Sixth Amendments to the United States Constitution. However, those rights are distinct and not necessarily co-extensive. *Rhode Island v Innis,* 446 US 291, 300 n 4 (1980). In *People v Smielewski,* 214 Mich App 55, 60–61 (1995), the Court of Appeals summarized the salient differences between the two rights:

> "A defendant's invocation of his Sixth Amendment right to counsel during judicial proceedings is distinct from the invocation of his Fifth Amendment right to counsel during custodial interrogation. . . . The Sixth Amendment right, which is offense-specific and cannot be invoked once for all future prosecutions, attaches only at or after adversarial judicial proceedings have been initiated. . . .
>
> "The Fifth Amendment right to counsel simply refers to the right to have an attorney present at a custodial interrogation; this right is not, therefore, implicated when a defendant requests an attorney at arraignment. . . . One may waive his Fifth Amendment right to counsel by voluntarily waiving his *Miranda* rights after arraignment....
>
> "In comparison, once the Sixth Amendment right to counsel has been invoked, any subsequent waiver during a police-initiated custodial interview is ineffective with respect to the formal charges filed against the defendant. . . . "'Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.'" [*McNeil v Wisconsin,* 501 US 171, 176 (1991)], quoting *Maine v Moulton,* 474 US 159, 180, n 16; 106 S Ct 477; 88 L Ed 2d 481 (1985). Indeed, a defendant's request for court-appointed counsel at an arraignment does not invalidate a waiver of the defendant's right to counsel under *Miranda* during a subsequent police-initiated interrogation concerning a different and unrelated offense." (Citations and footnotes omitted.)

"[W]hen the Sixth Amendment right to counsel attaches, it . . . encompasses offenses that, even if not formally charged, would be considered the same offense under . . . *Blockburger* [*v United States,* 284 US 299 (1932)]. . . ."* *Texas v Cobb,* 532 US 162, 173 (2001).

*See Section 6.23, below, for discussion of the *Blockburger* case.

Where an accused requests counsel before an arraigning magistrate, the police may not conduct further interrogations if counsel is not present, unless the accused initiates further communications, exchanges, or conversations with

the police. *People v Bladel (After Remand),* 421 Mich 39, 66 (1984), aff'd sub nom *Michigan v Jackson,* 475 US 625 (1986) (relying on *Edwards v Arizona,* 451 US 477 (1981)), and *People v Anderson (After Remand),* 446 Mich 392, 402 (1994).

Where police officers initiated contact with the defendant regarding a polygraph examination after the defendant was arraigned and appointed counsel and while the defendant remained in custody, the defendant's statements were obtained in violation of his Sixth Amendment right to counsel and should have been suppressed. *People v Harrington*, 258 Mich App 703, 706–07 (2003).

If the accused has requested counsel at arraignment, a waiver of the right made during police-initiated discussion is presumed involuntary. "[W]hen an accused has invoked his right to have counsel present. . . , a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards, supra,* 451 US at 484, cited in *Michigan v Jackson, supra,* 475 US at 635. If the accused chooses to initiate communications, he or she must be sufficiently aware of his or her Fifth and Sixth Amendment rights to effectuate a voluntary, knowing, and intelligent waiver of each right. *People v McElhaney,* 215 Mich App 269, 274 (1996).

To determine whether a waiver of an accused's Sixth Amendment right to counsel is knowing and intelligent, the court must examine the circumstances surrounding the purported waiver, including the background, experience, and conduct of the accused. *People v Riley,* 156 Mich App 396, 399 (1986), overruled on other grounds 453 Mich 132 (1996). The giving of *Miranda* warnings is sufficient to ensure that an accused's waiver of his or her Sixth Amendment right to counsel is knowing and intelligent. *Patterson, supra,* 487 US at 298–300, and *McElhany, supra* at 276–77.

Even where the accused initiates communication with authorities, it is a violation of ethical rules for the prosecuting attorney to communicate with, or cause the police to communicate with, the accused regarding the charged offense without notifying defense counsel. *People v Green,* 405 Mich 273, 289–92 (1979), construing former DR 7-104(A)(1). See current MRPC 3.8 and 4.2.

A defendant's Sixth Amendment right to counsel was violated when the defendant's former friend and neighbor (Heintzelman) was permitted to testify at the defendant's trial about inculpatory statements the defendant made during a late-night conversation Heintzelman, a reserve deputy in full uniform at the time of the conversation, had with the defendant in his maximum-security jail cell. *People v McRae*, 469 Mich 704, 715–18 (2004).

Statements taken in violation of the prophylactic rule established in *Michigan v Jackson, supra,* may be used to impeach the defendant at trial. *Michigan v Harvey,* 494 US 344, 345–46 (1990).

6.20 Motion for Substitution of Counsel for Defendant or Motion to Withdraw as Counsel for Defendant

Moving Party: Defendant or counsel for defendant

Burden of Proof: The moving party bears the burden of proof. An indigent defendant who seeks substitution of assigned counsel must show good cause for substitution. *People v Ginther*, 390 Mich 436, 441 (1973).

Discussion

An indigent defendant is guaranteed the right to counsel but has no right to appointed counsel of his or her choice. *People v Wilson*, 43 Mich App 459, 461–62 (1972), and *People v Mack*, 190 Mich App 7, 14 (1991). Appointment of substitute counsel is warranted only upon a showing of good cause and only if substitution will not unreasonably disrupt the judicial process. Where there is a legitimate difference of opinion between the defendant and appointed counsel as to a fundamental trial tactic, including a *bona fide* irreconcilable dispute regarding a substantial defense, there is good cause for substitution of counsel. *People v Jones*, 168 Mich App 191, 194 (1988), *People v Krist*, 93 Mich App 425, 436–37 (1979), and *Mack*, *supra*. Disagreements over trial strategy do not provide adequate grounds for substitution of counsel. *Krist*, *supra*. A defendant may not purposely break down the attorney-client relationship by refusing to cooperate with assigned counsel and then argue that there is good cause for substitution of counsel. *People v Meyers (On Remand)*, 124 Mich App 148, 166–67 (1983), and *People v Traylor*, 245 Mich App 460, 462–63 (2001). A defendant's filing of a grievance against trial counsel does not establish good cause per se for substitution of counsel. *Id*. A defendant's allegations that counsel did not see things defendant's way and did not pursue futile motions or meaningless discovery does not establish good cause for substitution of counsel. See *People v Russell*, 254 Mich App 11, 14 (2002), rev'd on other grounds 471 Mich 182 (2004) (matters of general legal expertise and strategy fall within the sphere of counsel's professional judgment).

The matter of substitution of counsel is addressed to the sound discretion of the court. *Wilson*, *supra* at 462, and *Mack*, *supra*. If there is a factual dispute concerning the defendant's claim that assigned counsel is not adequate or diligent, or that counsel is disinterested, the judge should take testimony and make findings. *Ginther*, *supra* at 441–42. By challenging the effectiveness of counsel, a defendant waives the attorney-client privilege regarding matters relevant to counsel's competence. MRPC 1.6(c)(5) and *People v Houston,* 448 Mich 312, 332–33 (1995). However, a defendant should receive protection from self-incrimination if he or she testifies at a "*Ginther* hearing." *People v Walker (On Rehearing),* 374 Mich 331, 338 (1965), and *Commonwealth v Chmiel,* 738 A2d 406, 424 (Pa 1999).

Under certain circumstances, an attorney may be obligated to request to withdraw from representation of a defendant. See MRPC 1.16.

Notwithstanding good cause for terminating representation, an attorney must continue to represent a defendant if so ordered by the court. MRPC 1.16(c).

6.21 Motion to Compel Discovery

Moving Party: Defendant, but the prosecuting attorney may also file a motion to compel discovery.

Burden of Proof: The defendant has the burden of showing facts indicating that the information sought is necessary to prepare a defense and to ensure a fair trial. *People v Maranian,* 359 Mich 361, 368 (1960). To be entitled to a remedy for a discovery violation, the moving party must show actual prejudice. *People v Taylor,* 159 Mich App 468, 482 (1987).

To establish a violation of *Brady v Maryland,* 373 US 83, 87 (1963), the defendant has the burden of showing 1) that the state possessed evidence favorable to him or her, 2) that the defendant did not possess the evidence and could not have obtained it through the exercise of due diligence, 3) that the prosecution suppressed the favorable evidence, and 4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *People v Lester,* 232 Mich App 262, 281 (1998), and *People v Fox (After Remand),* 232 Mich App 541, 549 (1998).

Discussion

1. Information That Must Be Disclosed by Both Parties

*Effective January 1, 2006.

In felony cases, discovery is governed by MCR 6.201. MCR 6.001(A). In misdemeanor cases, discovery is within the court's discretion. See *People v Laws,* 218 Mich App 447, 454 (1996). MCR 6.201(A)* lists the information that is subject to mandatory disclosure:

> **"(A) Mandatory Disclosure.** In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:
>
> > (1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial;
> >
> > (2) any written or recorded statement pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement;

> (3) the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion;
>
> (4) any criminal record that the party may use at trial to impeach a witness;
>
> (5) a description or list of criminal convictions, known to the defense attorney or prosecuting attorney, of any witness whom the party may call at trial; and
>
> (6) a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any document, photograph, or other paper, with copies to be provided on request. A party may request a hearing regarding any question of costs of reproduction. On good cause shown, the court may order that a party be given the opportunity to test without destruction any tangible physical evidence."

The January 1, 2006, amendment to MCR 6.201(A) requires disclosure when a party "may" call a witness or introduce evidence; prior to the amendment, the rule required disclosure if a party "intended to" call a witness or introduce evidence. The newly added alternative to disclosure of a witness's address in MCR 6.201(A)(1) is intended to preserve the witness's safety.

In addition to required disclosure under MCR 6.201(A)(1), the prosecuting attorney must attach a list of certain witnesses to the information and may be required to give reasonable assistance to the defendant to locate known witnesses. MCL 767.40a provides in pertinent part:

> "(1) The prosecuting attorney shall attach to the filed information a list of all witnesses know to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.
>
> "(2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.
>
> "(3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.

> "(4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.
>
> "(5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs. If the prosecuting attorney objects to a request by the defendant on the grounds that it is unreasonable, the prosecuting attorney shall file a pretrial motion before the court to hold a hearing to determine the reasonableness of the request."

MCR 6.112(D) similarly requires that a list be attached to the information of all witnesses known to the prosecuting attorney who might be called at trial and all *res gestae* witnesses known to the prosecutor or investigating law enforcement officers.

"A res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing full disclosure of the facts." *People v O'Quinn,* 185 Mich App 40, 44 (1990).

The prosecutor has no duty to exercise due diligence to locate and produce *res gestae* witnesses. *People v Burwick,* 450 Mich 281, 293 (1995), and *People v Snider,* 239 Mich App 393, 422–23 (2000). In *Burwick, supra* at 288–89, the Michigan Supreme Court stated that MCL 767.40a

> ". . . 1) contemplates notice at the time of filing the information of known witnesses who might be called and all other known res gestae witnesses, 2) imposes on the prosecution a continuing duty to advise the defense of all res gestae witnesses as they become known, and 3) directs that the list be refined before trial to advise the defendant of the witnesses the prosecutor intends to produce at trial. The prosecutor's duty [under previous law] has been replaced with an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request."

Subject to court rules and rules of evidence, parties have discretion in deciding what witnesses and evidence to present. MCR 6.416.

A prosecuting attorney is not required by MCR 6.201(A)(2) to provide unrecorded statements made by a complaining witness. *People v Tracey,* 221

Mich App 321, 323–24 (1997). A prosecuting attorney's notes of a witness interview do not constitute a statement subject to discovery. *People v Holtzman,* 234 Mich App 166, 168 (1999). To determine whether a witness has "adopted or approved" a statement, there must be a finding of "unambiguous and specific approval" by the witness. *Id.* at 179–80, quoting *Goldberg v United States,* 425 US 94, 115–16 (1976). A witness who reviews the prosecutor's notes for inaccuracies or in anticipation of the witness's testimony at trial does not "adopt or approve" the notes as a statement of the witness. *Holtzman, supra* at 180.

2. Information or Evidence That Must Be Disclosed by the Prosecuting Attorney

Pursuant to MCR 6.201(B), the prosecuting attorney must disclose certain information upon request. That rule states as follows:

> **"(B) Discovery of Information Known to the Prosecuting Attorney.** Upon request, the prosecuting attorney must provide each defendant:
>
> > (1) any exculpatory information or evidence known to the prosecuting attorney;
> >
> > (2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;
> >
> > (3) any written or recorded statements by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;
> >
> > (4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and
> >
> > (5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case."

Moreover, the defendant has a due-process right to obtain evidence in the prosecutor's possession if it is favorable to the defendant and material to guilt or punishment. *Brady, supra*. The prosecutor must provide such evidence to the defendant regardless of whether the defendant makes a request. *United States v Agurs,* 427 US 97, 104 (1976). However, withholding inadmissible exculpatory evidence is not necessarily a *Brady* violation. *Wood v Bartholomew,* 516 US 1, 5–6 (1995). To establish a *Brady* violation, a defendant must prove the following four elements. *Strickler v Greene,* 527 US 263, 281–82 (1999), *Lester, supra,* and *Fox, supra*.

1) The state possessed the evidence favorable to him or her. A violation does not occur simply because evidence is not disclosed.

The undisclosed evidence must truly be favorable to the defendant, which means that it is exculpatory or impeaching. *United States v Bagley,* 473 US 667, 676 (1985), and *People v Elston,* 462 Mich 751, 759–63 (2000). For example, the prosecution has a duty to disclose charges pending against one of its witnesses, but not that a witness is under investigation in an unrelated matter. *People v Brownridge (On Remand),* 237 Mich App 210, 215 (1999). The prosecutor has an obligation to learn of favorable evidence known to others acting on behalf of the government. *Kyles v Whitley,* 514 US 419, 437 (1995).

2) The defendant did not possess the evidence and could not have obtained it through the exercise of reasonable diligence.

3) The prosecuting attorney suppressed the favorable evidence, either willfully or inadvertently.

4) Had the evidence been disclosed to the defense, there is a reasonable probability that the outcome of the case would have been different. "The question is not whether the defendant would have been more likely than not to have received a different verdict, but whether he received a fair trial in the absence of the evidence, i.e., a trial resulting in a verdict worthy of confidence." *People v Fink,* 456 Mich 449, 454 (1998), citing *Kyles, supra*.

In *People v Banks*, 249 Mich App 247 (2002), the Court of Appeals, applying the *Brady* standard for discovery violations, found no abuse of discretion in the trial court's denial of defendant's motion for mistrial, where a police report detailing the victim's statement to the investigating detective was first disclosed to the defense (and prosecution) at trial, after the victim testified. In this armed robbery case, the victim testified at trial that he was able to identify his attackers because they removed their masks; however, during the victim's preliminary examination testimony, he made no mention of this. On appeal, the Court of Appeals found that, under the *Brady* standard, the police report was not "favorable evidence" and that it did not meet the *Brady* requirement of "materiality," which requires that there be a reasonable probability that the result of the proceeding would have been different had the police report been disclosed earlier. *Banks*, *supra* at 253-254. The Court found that discrepancies between the victim's preliminary examination and trial testimony existed despite what was contained in the police report, and that the trial was not rendered fundamentally unfair by the failure to disclose the report earlier. *Id*. at 254.

"[T]he Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *United States v Ruiz,* 536 US 622, 633 (2002).

3. Discovery of Privileged or Confidential Information

If the defendant seeks to discover privileged or confidential information, MCR 6.201(C) applies.* That provision states as follows:

*For a more complete discussion of this and related topics, see Smith, *Sexual Assault Benchbook* (MJI, 2002), Sections 5.14(C)(3) and 7.14–7.15, and Miller, *Crime Victim Rights Manual (Revised Edition)* (MJI, 2005), Chapter 5.

"(C) Prohibited Discovery.

> (1) Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination, except as provided in subrule (2).
>
> (2) If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an *in camera* inspection of the records.
>
> > (a) If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an *in camera* inspection, the trial court shall suppress or strike the privilege holder's testimony.
> >
> > (b) If the court is satisfied, following an *in camera* inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder's testimony.
> >
> > (c) Regardless of whether the court determines that the records should be made available to the defense, the court shall make findings sufficient to facilitate meaningful appellate review.
> >
> > (d) The court shall seal and preserve the records for review in the event of an appeal
> >
> > (i) by the defendant, on an interlocutory basis or following conviction, if the court determines that the records should not be made available to the defense, or
> >
> > (ii) by the prosecution, on an interlocutory basis, if the court determines that the records should be made available to the defense."

> (e) Records disclosed under this rule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide."

MCR 6.201(C)(2) is based on the Michigan Supreme Court's decision in *People v Stanaway,* 446 Mich 643 (1994). In *Stanaway,* the Court concluded that the "defendant's generalized assertion of a need to attack the credibility of his accuser did not establish the threshold showing of a reasonable probability that the records contain information material to his defense sufficient to overcome the [applicable] statutory privileges." *Id.* at 650.

In-camera inspection of records is not required "simply because psychological harm is the alleged 'personal injury' which must be established to satisfy the 'personal injury' element of first-degree criminal sexual conduct." *People v Tessin,* 450 Mich 944 (1995).

When considering whether a defendant has a due-process right to obtain material and exculpatory evidence from privileged or confidential sources, a court should utilize the standards articulated in *Brady* and its progeny. *Fink, supra* at 455, citing *Kyles, supra,* and *Pennsylvania v Ritchie,* 480 US 39 (1987).

4. Other Provisions of MCR 6.201

Other provisions of MCR 6.201 deal with excision of nondiscoverable information, protective orders, time requirements, the use of copies, the continuing duty of both parties to disclose newly discovered information, and modification of discovery orders. MCR 6.201(D)–(I) state as follows:

> **"(D) Excision.** When some parts of material or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts and may excise the remainder. The party must inform the other party that nondiscoverable information has been excised and withheld. On motion, the court must conduct a hearing in camera to determine whether the reasons for excision are justifiable. If the court upholds the excision, it must seal and preserve the record of the hearing for review in the event of an appeal.
>
> **"(E) Protective Orders.** On motion and a showing of good cause, the court may enter an appropriate protective order.* In considering whether good cause exists, the court shall consider the parties' interests in a fair trial; the risk to any person of harm, undue annoyance, intimidation, embarrassment, or threats; the risk that evidence will be fabricated; and the need for secrecy regarding the identity

*See also MCL 780.651 for rules governing nondisclosure of search warrant affidavits.

> of informants or other law enforcement matters. On motion, with notice to the other party, the court may permit the showing of good cause for a protective order to be made *in camera.* If the court grants a protective order, it must seal and preserve the record of the hearing for review in the event of an appeal.
>
> **"(F) Timing of Discovery.** Unless otherwise ordered by the court, the prosecuting attorney must comply with the requirements of this rule within 21 days of a request under this rule and a defendant must comply with the requirements of this rule within 21 days of a request under this rule.
>
> **"(G) Copies.** Except as ordered by the court on good cause shown, a party's obligation to provide a photograph or paper of any kind is satisfied by providing a clear copy.
>
> **"(H) Continuing Duty to Disclose.** If at any time a party discovers additional information or material subject to disclosure under this rule, the party, without further request, must promptly notify the other party.
>
> **"(I) Modification.** On good cause shown, the court may order a modification of the requirements and prohibitions of this rule."

5. Remedy for Violation of Discovery Order

The remedy for a violation of a discovery order is within the court's discretion. MCR 6.201(J) states as follows:

> **"(J) Violation.** If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances. Parties are encouraged to bring questions of noncompliance before the court at the earliest opportunity. Wilful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court. An order of the court under this section is reviewable only for abuse of discretion."

See also *People v Clark,* 164 Mich App 224, 229 (1987) (denial of discovery of inculpatory evidence does not necessarily constitute a denial of due process, and trial courts have discretion to fashion appropriate remedies).

"The court may impose such sanctions as it deems just" under MCR 2.313(B). *People v Elkhoja,* 251 Mich App 417, 439 (2002), rev'd on other grounds 467 Mich 916 (2003).

When fashioning an appropriate remedy, a court must balance the defendant's interest in optimal preparation and minimizing prosecutorial opportunities to falsify evidence, the public's and prosecutor's interest in proceeding to trial, and the interest of the court in compliance with procedural rules. *People v Loy-Rafuls,* 198 Mich App 594, 597 (1993), rev'd on other grounds 442 Mich 915 (1993). The court must examine all relevant circumstances, including "the causes and bona fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice." *Taylor, supra* at 482. Precluding the use of evidence is to be the remedy in only the most egregious cases where other remedies, such as a continuance, do not adequately protect the interests at stake. *People v Burwick,* 450 Mich 281, 294, 298 (1995), and *Taylor, supra* at 487. Where there is no cognizable prejudice to a defendant in not producing information or in permitting its late production, exclusion is inappropriate. *Burwick, supra* at 297. The court may also dismiss the charges in egregious cases. *People v Davie (After Remand),* 225 Mich App 592, 598 (1997) (dismissal without prejudice was the proper remedy for "prosecutor's complete failure to insure that defendants were provided with timely discovery").

If the undisclosed evidence is no longer available, having been destroyed or lost, and if it relates exclusively to a particular witness, exclusion at trial of testimony from that witness will usually adequately protect the defendant's interests. *People v Albert,* 89 Mich App 350, 351 (1979), and *People v Drake,* 64 Mich App 671, 680–83 (1979). However, if the evidence is no longer available, and if the impact of its loss cannot be readily determined, further inquiries are needed. Absent intentional suppression or a showing of bad faith, the loss of evidence that occurs before a defense request for it does not call for discovery sanctions. *People v Somma,* 123 Mich App 658, 663 (1983). When the state fails to preserve evidence that can be established to be exculpatory, its motivation is irrelevant. A severe sanction must be imposed. When, however, the state has failed to preserve evidence of which no more can be said than that it could be exculpatory, that failure is not subject to a sanction unless the defendant can show bad faith by the police. *People v Leigh,* 182 Mich App 96, 97–98 (1989), applying *Arizona v Youngblood,* 488 US 51 (1981).

If the prosecution attempts to use at trial evidence that should have been disclosed pursuant to a discovery order, that evidence may not be used in the case-in-chief. The Court of Appeals is split on whether it may be used for impeachment. Compare *People v Pace,* 102 Mich App 522, 528–33 (1980), and *People v Turner,* 120 Mich App 23, 29–33 (1982), excluding the evidence even for impeachment, with *People v Lynn,* 91 Mich App 117, 126–27 (1979), aff'd 411 Mich 291 (1981), allowing impeachment by undisclosed evidence. The Supreme Court's affirmance of the Court of Appeals should not be read

as affirming this evidentiary point. The only item under consideration by the Supreme Court was the definition of kidnapping.

6.22 Motion to Disqualify Judge

Moving Party: Defendant or prosecutor*

*For further discussion, see Johnson, *Michigan Circuit Court Benchbook* (MJI, 2004), Section 1.4.

Burden of Proof: The moving party has the burden of showing grounds for disqualification. A party challenging a judge on the basis of bias or prejudice bears the burden of overcoming the heavy presumption of judicial impartiality. *Cain v Dep't of Corr*, 451 Mich 470, 497 (1996), and *In re Forfeiture of $1,159,420*, 194 Mich App 134, 151 (1992). One who challenges a judge on the basis of the constitutional right to an unbiased and impartial tribunal also bears a heavy burden. *Cain*, *supra* at 498–99 n 33.

Discussion

Pursuant to MCR 2.003(B), "[a] judge is disqualified when the judge cannot impartially hear a case." Michigan Court Rule 2.003(B) sets forth a nonexhaustive list of circumstances in which a judge is disqualified, including instances when a judge is personally biased or prejudiced against a party or attorney. MCR 2.003(B)(1).

Bias or prejudice is defined as an attitude or state of mind belying an aversion or hostility of such a degree that a fair-minded person could not entirely set it aside when judging certain persons or causes. *Cain*, *supra* at 495. For purposes of disqualification, a judge's bias or prejudice must be actual and personal. *Id*. Unless the alleged bias or prejudice displays such deep-seated favoritism or antagonism that a fair judgment would be impossible, a judge's favorable or unfavorable disposition must arise from facts or events outside the current judicial proceeding. *Id*. at 495–96, 513. The mere fact that a judge conducted a prior proceeding against the defendant does not amount to proof of disqualifying bias. *People v White*, 411 Mich 366, 386 (1981), and *People v Koss*, 86 Mich App 557, 560 (1978). A judge who sits as trier of fact and finds the defendant guilty is not automatically disqualified from acting as trier of fact at the defendant's retrial after reversal on appeal. *People v Upshaw*, 172 Mich App 386, 388–89 (1988). A judge who presides over a plea proceeding, during which the defendant provides a factual basis for a guilty plea but then decides not to plead guilty, need not *sua sponte* disqualify himself or herself from conducting the defendant's subsequent bench trial. *People v Cocuzza*, 413 Mich 78, 83 (1982).

Motions for disqualification may also be based on an alleged violation of the due-process requirement that a decisionmaker be unbiased and impartial. *Cain*, *supra* at 497–98, and *Crampton v Dep't of State*, 395 Mich 347, 350 (1975). It is only in the most extreme cases that a judge will be disqualified for bias or prejudice on due-process grounds. *Cain*, *supra* at 497–98. Examples of instances in which the probability of actual bias may be too high

to be constitutionally tolerable, and in which a judge may therefore be disqualified notwithstanding the absence of a showing of actual bias, include situations where a judge: 1) has a pecuniary interest; 2) has been insulted, slandered and vilified by a party; 3) has revealed deep prejudice against the defendant's profession and has recently been a losing party in a civil rights lawsuit filed by the defendant; or 4) might have prejudged the case because of prior participation in the case as one who personally conducted the initial investigation, amassed evidence, and filed and prosecuted the charges, or as one who made the initial decision which is under review. *Crampton*, *supra* at 351–55, and *Cain*, *supra* at 497–502, 514. Due process is violated when full-time law enforcement officials, charged with responsibility for arrest and prosecution of law violators, sit as adjudicators in law enforcement disputes between citizens and police officers. *Crampton*, *supra* at 356–58.

MCR 2.003(C)(1) states as follows:

> "(1) *Time for Filing.* To avoid delaying trial and inconveniencing the witnesses, a motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. If a motion is not timely filed, untimeliness, including delay in waiving jury trial, is a factor in deciding whether the motion should be granted."

The 14-day deadlines for filing a motion to disqualify are mandatory. *Cain, supra* at 493, and Dean & Longhofer, Michigan Court Rules Practice (4th ed), §2003.8, p 55 (the 14-day deadlines in the subrule are mandatory, and the "untimeliness" in the third sentence refers to time requirements other than those stated in the first two sentences of the subrule). "Whenever a challenged judge has denied a disqualification motion and a request for a hearing before another judge comes after a trial or hearing has started[,] the challenged judge should have the option of proceeding with the trial or hearing unless a chief judge or a higher court orders that the trial or hearing be interrupted or delayed so that the disqualification motion may be considered by another judge before the trial or hearing is concluded." *People v McDonald,* 97 Mich App 425, 433 (1980), vacated on other grounds 411 Mich 870 (1981). See also *In re Contempt of Steingold (In re Smith),* 244 Mich App 153, 160–61 (2000) (the juvenile court referee did not err in denying defense counsel's oral motion for disqualification on the first day of trial, but the referee did err by not referring the matter to the chief judge as required under MCR 2.003(C)(3)).

The motion must be accompanied by an affidavit and must include all known grounds for disqualification. MCR 2.003(C)(2). The challenged judge decides the motion and, if the motion is denied and a party so requests, the challenged judge must refer the motion to the chief judge (if the court has more than one judge) or to a judge appointed by the state court administrator (if the court has only one judge or where the challenged judge is the chief judge) for *de novo* decision. MCR 2.003(C)(3). The parties may agree to waive disqualification

for grounds other than personal bias or prejudice concerning a party. MCR 2.003(D).

6.23 Motion to Dismiss Because of Double Jeopardy—Successive Prosecutions for the Same Offense

Moving Party: Defendant

Burden of Proof: "[I]f a defendant can make a prima facie showing of a violation of the Double Jeopardy Clause, a second prosecution is barred unless the government can demonstrate by a preponderance of the evidence why double jeopardy principles do not bar prosecution." *People v Wilson,* 454 Mich 421, 428 (1997).

If the defendant claims that prosecution in Michigan for a controlled substance offense is barred by MCL 333.7409, the defendant must prove by a preponderance of the evidence that the statute bars a second prosecution. *People v Mezy,* 453 Mich 269, 282–83, 286 (1996).

Discussion

The federal and Michigan constitutions both prohibit putting a defendant twice in jeopardy for the same offense. US Const, Am V, and Const 1963, art 1, § 15. The guarantee against double jeopardy affords a criminal defendant the following two protections:

1) Protection against successive prosecutions for the same offense. This protection preserves the finality of criminal judgments. *People v Sturgis,* 427 Mich 392, 398–99 (1986). It prohibits a second prosecution of the same offense after an acquittal or conviction. *People v Garcia,* 448 Mich 442, 448 (1995) (Riley, J). The protection against successive prosecutions for the same offense is discussed in this section.

2) Protection against multiple punishments for the same offense. This protection prevents the courts from sentencing a defendant more than once for the same offense by requiring them to confine their sentences within the limits established by the Legislature. *Sturgis, supra* at 399. The protection against multiple punishments for the same offense is discussed in Section 6.24, below.

1. Multiple Charges for Conduct Related to Same Act or Transaction

The Michigan Supreme Court readopted the "same-elements" test to determine whether the prohibition against double jeopardy is violated when multiple charges are brought against a defendant for conduct related to a single criminal transaction. *People v Nutt*, 469 Mich 565, 567–68 (2004). In

Nutt, the Court overruled its decision in *People v White*, 390 Mich 245 (1973), where the Court disapproved of the "same-elements" test in favor of the "same transaction" test as the means of resolving double jeopardy issues. The "same transaction" test generally prohibited serial prosecutions of a defendant for entirely different crimes arising from a single criminal episode or "transaction." *Nutt, supra*. Until the *White* decision in 1973, Michigan courts had interpreted the prohibition against double jeopardy as precluding multiple prosecutions of a defendant for crimes involving identical elements. *Id*.

Michigan's return to the same-elements test signifies a return to "the well-established method of defining the Fifth Amendment term 'same offence'" known as the *Blockburger* test. *Nutt, supra* at 576; *Blockburger v United States*, 284 US 299, 304 (1932). The *Blockburger* test "focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Nutt, supra* at 576, quoting *Iannelli v United States*, 420 US 770, 785 n 17 (1975).

The same-elements test, as dictated directly by the *Blockburger* Court, provides:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger, supra*, 284 US at 304; *Nutt, supra* at 577–78.

2. Retrial for the Same Offense After Declaration of a Mistrial

If the termination of a criminal trial prior to verdict is a "manifest necessity," the defendant's right to avoid being twice placed in jeopardy is not implicated. *Richardson v United States,* 468 US 317, 323–24 (1984), and *People v Thompson,* 424 Mich 118, 123 (1985). "Manifest necessity" includes the illness of a witness, *People v Raybon,* 125 Mich App 295, 297–98 (1983), and the failure of a jury to agree on a verdict, *Richardson, supra,* and *Thompson, supra.*

A deadlocked jury does not preclude another trial as a matter of double jeopardy. *People v Herron,* 464 Mich 593, 602–03 (2001). A trial judge enjoys broad discretion in finding manifest necessity to discharge a deadlocked jury. *Arizona v Washington,* 434 US 497, 509–10 (1978), and *People v Lett,* 466 Mich 206, 219–21 (2002). In cases involving deadlocked juries, in the absence of objection by either party, trial courts are not required to examine alternatives to mistrial or make findings on the record. *Washington, supra,* 434 US at 515–17, and *Lett, supra* at 221. A trial court is not required to poll a jury that announces that it is deadlocked. MCR 6.420(D) and *People v Daniels,* 192 Mich App 658, 663 (1992). Multiple deadlocked

juries in a case do not preclude continuing to try the defendant. *People v Sierb,* 456 Mich 519, 533 (1998) (third prosecution of the defendant does not violate the due-process guarantees of the federal and state constitutions).

A defense motion for or consent to a mistrial operates as a waiver of a double jeopardy objection to retrial where the mistrial results from unintentional conduct by the court or the prosecutor. *People v Benton,* 402 Mich 47, 54 (1977), and *People v Bommarito,* 110 Mich App 207, 210 (1981). However, mere silence or failure to object to the jury's discharge does not constitute adequate consent. There must be "an affirmative showing [of consent] on the record." A request for mistrial is consent. *People v Johnson,* 396 Mich 404, 432–33 (1976), repudiated on other grounds 427 Mich 482 (1986), and *People v Harvey,* 121 Mich App 681, 688–89 (1982). An objection to continuation of a trial also constitutes consent although a mistrial per se is also objected to. *People v Tracey,* 221 Mich App 321, 329 (1997). A defendant's right against double jeopardy is not violated when a trial court reinstates a defendant's charge after granting the defendant's motion to dismiss when the complainant and two other prosecution witnesses failed to return on time after a lunch recess. *People v Grace*, 258 Mich App 274, 279–80 (2003). The defendant in *Grace* requested and received a dismissal, which is the equivalent of the defendant's consent to a mistrial, after which retrial on the same charge is constitutionally permissible. *Id*.

If the defendant's motion for mistrial is precipitated by prosecutorial misconduct that was intended to provoke the defendant into moving for a mistrial, retrial is barred. *Oregon v Kennedy,* 456 US 667, 679 (1982), *People v Dawson,* 431 Mich 234, 257 (1988) (the court must evaluate the objective facts and circumstances, not the prosecutor's subjective intent), and *People v Gaval,* 202 Mich App 51, 53–54 (1993).

3. Retrial Barred by Acquittal

If a defendant has been tried and acquitted, he or she may not be retried for the same offense. Retrial is barred even if the acquittal was by directed verdict or the trier of fact was the court and the legal ruling underlying the acquittal was clearly erroneous. *Smalis v Pennsylvania,* 476 US 140, 145 (1986), *People v Nix,* 453 Mich 619, 624 (1996), and *In re Wayne County Pros,* 192 Mich App 677, 680–81 (1992). The prosecution can appeal only to get a legal ruling; the case cannot be reinstated. *Wayne County Pros v Recorder's Court Judge,* 177 Mich App 762, 765 (1989). However, the court's characterization of its ruling as a directed verdict does not necessarily preclude an appeal and another trial if the ruling was actually that the verdict was against the great weight of the evidence, not insufficient as a matter of law. *People v Hutchinson,* 224 Mich App 603, 607 (1997), and *People v Mehall,* 454 Mich 1, 5–6 (1997). A retrial is not permitted if the trial court evaluated the evidence, found that it was legally insufficient to sustain a conviction, and said so with sufficient clarity and finality that the judge's statement can be construed as an order. *People v Vincent,* 455 Mich 110, 120 (1997).

If a defendant has been tried and convicted of a lesser-included offense, that conviction constitutes an implied acquittal of the more serious charge or charges and precludes another trial on them. *Price v Georgia,* 398 US 323, 327 (1970), and MCL 768.33. See *People v McPherson,* 21 Mich App 385, 389 (1970) (defendant charged with "rape" but convicted of assault with intent to commit "rape" could not be retried on the original charge), and *People v Hilliker,* 29 Mich App 543, 549 (1971) (a defendant charged with first-degree murder but convicted of manslaughter may not be retried for first-degree or second-degree murder). In a prosecution for felony murder for a killing during an armed robbery, a conviction of second-degree murder that is subsequently reversed on appeal bars a retrial of the armed robbery charge and the first-degree murder charge. The first conviction implied an acquittal of the armed robbery charge and an express acquittal of the felony murder charge. *People v Garcia (After Remand),* 203 Mich App 420, 425–26 (1994).

4. Retrial Barred by Appellate Reversal

If a reversal on appeal is due to lack of evidence, there can be no retrial. The defendant is entitled to discharge. *Burks v United States,* 437 US 1, 18 (1978), *Greene v Massey,* 437 Mich 19, 25 (1978), and *People v Murphy,* 416 Mich 453, 467 (1982). However, if the reason for reversal is anything else, the defendant may be retried. *People v Torres,* 209 Mich App 651, 659 (1995), aff'd and remanded on other grounds 452 Mich 43 (1996). See *Tibbs v Florida,* 457 US 31, 45 (1982) (retrial is permitted when a new trial is granted because the verdict was against the great weight of the evidence). Double jeopardy does not bar reinstatement of an original charge following a guilty plea and sentencing on a reduced charge where the basis for the reduction is overturned on appeal. *People v Howard,* 212 Mich App 366, 370 (1995).

Double jeopardy does not bar an appellate court from reversing an order setting aside a guilty verdict and reinstating the conviction. The protection against double jeopardy is not offended because there is no need for a second trial. *People v Jones,* 203 Mich App 74, 78–79 (1993).

The resentencing, upon reversal procured by the prosecution, as an adult of an individual who was originally sentenced as a juvenile and who was discharged from the juvenile system before the reversal does not violate the protection against double jeopardy. *People v Thenghkam,* 240 Mich App 29, 69–71 (2000).

5. Michigan's "Separate Sovereign" Rules

Two entities seeking to prosecute a defendant for the same offense are separate sovereigns when their authority to prosecute the offense comes from two independent sources; a separate sovereign is not barred by double jeopardy from prosecuting a defendant for a crime resulting from the same conduct for which the defendant was already convicted and sentenced by a different sovereign. *People v Davis*, 472 Mich 156, 158 (2005). In *Davis*, the defendant stole a car in Michigan and drove it to Kentucky where he was

apprehended. He pled guilty to Kentucky's charges for the theft and was sentenced. Michigan charged the defendant for the same conduct, and the defendant argued that double jeopardy principles as explained in *People v Cooper*, 398 Mich 450 (1976), prohibited Michigan from prosecuting him because he had already been punished in Kentucky for the same criminal conduct.

The *Davis* Court expressly overruled the *Cooper* Court's ruling after finding that ratifiers of Michigan's constitution intended for Michigan's double jeopardy clause to be interpreted the same as was the federal double jeopardy clause. United States Supreme Court decisions in *Bartkus v Illinois,* 359 US 121 (1959), and *Heath v Alabama*, 474 US 82 (1985), establish that successive prosecutions by dual sovereigns (whether federal/state or state/state) are not barred by the federal double jeopardy clause provided the entities involved derive their power to prosecute crimes from distinct and independent sources. *Davis*, *supra* at 162, 166–67.

A provision of the Controlled Substances Act, MCL 333.7409, states:

> "If a violation of this article is a violation of federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state."

If this statute applies to the case, it operates as a complete bar to subsequent prosecution in Michigan; constitutional double jeopardy principles do not apply. *People v Avila (On Remand),* 229 Mich App 247, 250–52 (1998), overruled on other grounds 469 Mich 80 (2003).

In *People v Zubke*, 469 Mich 80, 84 (2003), the Michigan Supreme Court ruled that the state's possession with intent to deliver charge was not precluded under MCL 333.7409 by the defendant's federal drug-conspiracy conviction because the conduct on which the federal conviction was based was not the "same act" on which the state charge relied.

6.24 Motion to Dismiss Because of Double Jeopardy—Multiple Punishments for the Same Offense

Moving Party: Defendant

Burden of Proof: "[I]f a defendant can make a prima facie showing of a violation of the Double Jeopardy Clause, a second prosecution is barred unless the government can demonstrate by a preponderance of the evidence why double jeopardy principles do not bar prosecution." *People v Wilson,* 454 Mich 421, 428 (1997).

Discussion

The federal and Michigan constitutions both prohibit putting a defendant twice in jeopardy for the same offense. US Const, Am V, and Const 1963, art 1, § 15. The guarantee against double jeopardy affords a criminal defendant the following two protections:

1) Protection against successive prosecutions for the same offense. This protection preserves the finality of criminal judgments. *People v Sturgis,* 427 Mich 392, 398–99 (1986). It prohibits a second prosecution of the same offense after an acquittal or conviction. *People v Garcia,* 448 Mich 442, 448 (1995) (Riley, J). The protection against successive prosecutions for the same offense is discussed in Section 6.23, above.

2) Protection against multiple punishments for the same offense. This protection prevents the courts from sentencing a defendant more than once for the same offense by requiring them to confine their sentences within the limits established by the Legislature. *Sturgis, supra* at 399. The protection against multiple punishments for the same offense is briefly outlined in this section.

The Legislature's intent is determinative in cases involving multiple punishment. In *People v Roubideau,* 419 Mich 458, 486–88 (1984), the Michigan Supreme Court set forth the following guidelines for ascertaining legislative intent:

> "Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments. A court must identify the type of harm the Legislature intended to prevent. Where two statutes prohibit violations of the same social norm, albeit in a somewhat different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments. . . .
>
> "A further source of legislative intent can be found in the amount of punishment expressly authorized by the Legislature. . . . Where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes. The Legislature has taken conduct from the base statute, decided that aggravating conduct deserves additional punishment, and imposed it accordingly, instead of imposing dual convictions. . . .
>
> "We do not intend these principles to be an exclusive list. Whatever sources of legislative intent exist should be

> considered. If no conclusive evidence of legislative intent can be discerned, the rule of lenity requires the conclusion that separate punishments were not intended."

In *Blockburger v United States,* 284 US 299, 304 (1932), the United States Supreme Court articulated the following test for deciding whether a defendant has been punished twice for the same offense:

> "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

In *Sturgis, supra* at 404–05, the Michigan Supreme Court noted its rejection of a "wooden application" of the *Blockburger* test and its adoption of the more flexible standard set forth in *Robideau, supra.* However, the *Sturgis* Court acknowledged the continuing usefulness of *Blockburger* as a rule of statutory construction to be applied when it is probative of legislative intent. See also *People v Harding,* 443 Mich 693, 712–13 (1993) (whether one offense is a lesser-included offense of another offense may also be helpful in determining the Legislature's intent to allow multiple punishments for the two offenses).

In *People v Herron,* 464 Mich 593 (2001), the defendant was charged with second-degree murder and operating a motor vehicle while intoxicated causing death (OWI causing death). The jury deadlocked on the second-degree murder charge and convicted defendant of negligent homicide as a lesser offense of OWI causing death. Following retrial of the second-degree murder charge, the jury convicted defendant of involuntary manslaughter. The Michigan Supreme Court held that defendant's conviction of both negligent homicide and involuntary manslaughter, at successive trials, constituted impermissible multiple punishments. *Id.* at 596. The Court also held that the proper remedy was to affirm defendant's conviction of the greater offense, involuntary manslaughter, and vacate his conviction of negligent homicide, the lesser offense. *Id.* After noting that *Harding, supra* at 715–16, determined that multiple-punishment issues arising from successive trials should be treated in the same manner as such issues arising from a single trial, the *Herron* Court extended that rule to cases in which the multiple-punishment issue arises in a second trial following declaration of a mistrial. *Herron, supra* at 608–09.

In *People v Ford*, 262 Mich App 443 (2004), the Court first noted that the Michigan Supreme Court's decision in *People v Nutt*, 469 Mich 565 (2004),* while signaling a return to the "same elements" test for determining whether double jeopardy protections prohibited successive prosecutions for the "same offense," did not address the multiple punishment prong of a defendant's double jeopardy protections. *Ford, supra* at 450 n 2. The *Blockburger* "same elements" test creates only a presumption that the "legislature intended multiple punishments where two distinct statutes cover the same conduct but

*See Section 6.23, above, for a discussion of *Nutt.*

each requires proof of an element the other does not; the contrary presumption arises when one offense's elements are encompassed in the elements of the other." *Ford, supra* at 448–49. Either presumption may be overcome by a clear legislative expression of contrary intent. *Id.* at 449. The *Ford* Court explained:

> "[U]nder both the federal and Michigan Double Jeopardy Clauses the test is the same: 'in the context of multiple punishment *at a single trial*, the issue whether two convictions involve the same offense for purposes of the protection against multiple punishment is solely one of legislative intent.'" *Ford, supra* at 450, quoting *Sturgis, supra* at 399.

With respect to ascertaining legislative intent, the *Ford* Court repeated principles set forth by the Michigan Supreme Court in *Robideau, supra*:

> "'Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments. A court must identify the type of harm the Legislature intended to prevent. Where two statutes prohibit violations of the same social norm, albeit in a somewhat different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments.'" *Ford, supra* at 450, quoting *Robideau, supra* at 487–88.

Enhanced sentences for habitual offenders do not constitute multiple punishment for the earlier offenses. *Monge v California,* 524 US 721, 728 (1998), and *United States v Watts,* 519 US 148, 154 (1997).

6.25 Motion to Dismiss Because of Entrapment

Moving Party: Defendant

Burden of Proof: The defendant must prove a claim of entrapment by a preponderance of the evidence. *People v D'Angelo,* 401 Mich 167, 183 (1977).

Discussion

1. Procedural Issues

Entrapment is an affirmative defense to be decided by the judge outside the presence of the jury. *D'Angelo, supra* at 174, 176–77. A motion to dismiss on the basis of entrapment may be raised and decided either before or during trial. *Id.* at 177–78. An entrapment defense presents facts that are collateral to the charge and that justify barring a defendant's prosecution; if entrapment is

found, the related charge is dismissed. *Id.* at 179, and *People v Jones,* 203 Mich App 384, 386 (1994). Thus, pretrial consideration of the entrapment issue is preferred.

When the defendant raises the issue of entrapment, the court must conduct an evidentiary hearing outside of the jury's presence and make specific findings of fact. *D'Angelo, supra* at 176–78, 183, and *People v Woods,* 241 Mich App 545, 554–55 (2000). A defendant need not admit the crime to claim entrapment. *People v LaBate,* 122 Mich App 644, 646 (1983).

The defense of entrapment may only be advanced at the trial level. An examining magistrate does not have jurisdiction to resolve a claim of entrapment. *People v Moore,* 180 Mich App 301, 308–09 (1989).

The defense of entrapment is personal to the defendant who was the victim of police misconduct. A codefendant of an entrapped defendant may not assert the defense where an informant's activities were directed only at the entrapped defendant and were not within the knowledge of the codefendant. *People v Soltis,* 104 Mich App 53, 55 (1981). However, where the charges against a defendant and codefendant arise from the same allegedly impermissible police misconduct, it is proper for a trial court to apply its entrapment findings to both defendants. *People v Forrest,* 159 Mich App 329, 333 (1987), and *People v Matthews,* 143 Mich App 45, 54 (1985).

2. The Test for Entrapment

In *People v Turner,* 390 Mich 7, 22 (1973), the Michigan Supreme Court rejected the subjective test of entrapment prevalent in other states and used in federal courts. The "subjective test" focused on whether the defendant was "predisposed" to commit the alleged offense or "otherwise innocent." *Id.* at 19. The Court in *Turner* adopted an objective test that focuses on "whether the actions of the police were so reprehensible under the circumstances that the Court should refuse, as a matter of public policy, to permit a conviction to stand." *Id.* at 22. In *People v Fabiano,* 192 Mich App 523, 526 (1992), the Court of Appeals held that the Supreme Court had modified the objective test in *People v Juillet,* 439 Mich 34 (1991). Claims of entrapment must be analyzed according to a two-pronged test. Where the defense is asserted, a trial court must consider whether:

1) the police engaged in impermissible conduct that would induce a law-abiding person situated as the defendant was to commit a crime in similar circumstances, OR

2) the police engaged in conduct so reprehensible that it cannot be tolerated, irrespective of whether the conduct caused the defendant to commit the crime. *Id.* See also *People v Hampton,* 237 Mich App 143, 156 (1999), *People v Williams,* 196 Mich App 656, 661 (1992), and *People v Kent,* 194 Mich App 206, 211 (1992).

- **Causation Test**

The first type of entrapment does not exist if the police conduct would induce only those persons who are ready and willing to commit the offense to do so. *Fabiano, supra* at 531. With regard to the first type of entrapment, several factors may be considered when determining whether the governmental activity would have induced criminal conduct:

1) whether there existed any appeals to the defendant's sympathy as a friend;

2) whether the defendant had been known to commit the crime with which he was charged;

3) whether there were any long lapses of time between the investigation and arrest;

4) the existence of any inducements that would make the crime particularly attractive;

5) offers of excessive consideration or other enticement;

6) a guarantee that the acts alleged as crimes were not illegal;

7) whether and to what extent any pressure was applied;

8) the offering and/or giving of sexual favors;

9) whether there were any threats of arrest;

10) the existence of any government procedures that tend to escalate the criminal culpability of the defendant;

11) the police control over any informant; and

12) whether the investigation was targeted. *People v Juillet,* 439 Mich 34, 56–57 (1991) (Brickley, J).

When a defendant claims that the activities of a person who is not a police officer entrapped him or her, those activities must be undertaken as an agent of the police. *People v Potra,* 191 Mich App 503, 509–10 (1991) (no entrapment found where informant may have induced defendant to sell drugs on the basis of their past friendship).

- **Reprehensible Conduct Test**

Although the foregoing considerations are relevant to the reprehensible conduct test, more reprehensible conduct is necessary to establish entrapment of the second type. *Fabiano, supra* at 531. Except for *People v Brown,* 439 Mich 34 (1991), and *People v Martin,* 199 Mich App 124, 126 (1993), there are no cases finding reprehensible conduct entrapment. In *Brown,* trading sex for drugs was found to be reprehensible conduct. In *Martin,* it was found to be

reprehensible conduct to condition an informant's payments on a defendant's conviction.

So-called "reverse buys" are not entrapment when they merely furnish an opportunity to commit an offense. *People v Butler,* 444 Mich 965, 965–66 (1994), and *Williams, supra* at 663. Law enforcement officers may distribute controlled substances, at least in small amounts, to other persons as a means of detecting criminal activity. The distribution of large quantities as bait might be intolerable, on the other hand. *People v Connolly,* 232 Mich App 425, 430–32 (1998).

3. "Sentence Entrapment"

It is not "sentence entrapment" for the police to wait to arrest a defendant while engaging him or her in additional, larger drug transactions with the result that the potential penalty increases, either because of greater amounts of drugs, consecutive sentences, or higher sentencing guidelines scores, so long as all the police did was give the defendant an opportunity to commit additional crimes. *People v Ealy,* 222 Mich App 508, 510–12 (1997).

4. "Entrapment by Estoppel"

"Entrapment by estoppel" is a variation of ordinary entrapment. It applies when a defendant establishes by a preponderance of evidence that

1) a government official told him or her that certain conduct, which was actually criminal, was legal;

2) that the defendant actually relied on the official's statements;

3) that the reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statements; and

4) that, given the defendant's reliance, prosecution would be unfair. *Woods, supra* at 558–59.

In other words, the defense is available only where an earnest, law-abiding citizen attempts in good-faith to comply with the law by consulting an appropriate government official but unfortunately receives misinformation. *Id.* at 550. The defense is not available when the citizen knows better or should know better, or manipulated the official into giving bad advice, but attempts to seek immunity by claiming reliance on misinformation from a government official. Then, prosecution is not unfair.

6.26 Motion to Exclude Public and Press From Preliminary Examination in Sexual Misconduct Cases

Moving Party: Defendant or prosecutor

Burden of Proof: In cases involving charges of criminal sexual conduct in any degree, assault with intent to commit criminal sexual conduct, sodomy, gross indecency, or any other offense involving sexual misconduct, the court may close the preliminary examination to the public if the moving party shows that the need for protection of a victim, a witness, or the defendant outweighs the public's right of access to the examination. Denial of access to the examination must be narrowly tailored to accommodate the interest being protected. MCL 766.9(1)(a)–(b).

Discussion

To determine whether closure of the preliminary examination is necessary to protect a victim or witness, the court must consider:

> "(a) The psychological condition of the victim or witness.
>
> "(b) The nature of the offense charged against the defendant.
>
> "(c) The desire of the victim or witness to have the examination closed to the public." MCL 766.9(2).

The court may close a preliminary examination to protect the right of a party to a fair trial only if both of the following apply:

> "(a) There is a substantial probability that the party's right to a fair trial will be prejudiced by publicity that closure would prevent.
>
> "(b) Reasonable alternatives to closure cannot adequately protect the party's right to a fair trial." MCL 766.9(3).

If the judge or magistrate decides to close the preliminary examination to members of the general public, he or she must state on the record the specific reasons for the decision. MCL 766.9(1)(c). The decision is within the discretion of the judge or magistrate. In narrowly tailoring closure to accommodate the interests of a victim testifying about sensitive matters, the magistrate should only close those portions of the examination in which such matters are discussed. *In re Closure of Prelim Exam (People v Jones)*, 200 Mich App 566, 569–70 (1993).

6.27 Motion to Exclude Public and Press From Trial

Moving Party: Defendant or prosecuting attorney

Burden of Proof: The moving party bears a heavy burden to show a substantial probability that prejudicial error depriving the defendant of a fair trial will result if the case is open to the press and public, a substantial

probability that closure will be effective in dealing with the danger, and a substantial probability that no alternative to closure exists that would protect the defendant's right to a fair trial. *Detroit Free Press v Recorder's Court Judge,* 409 Mich 364, 390 (1980), and *People v Kline,* 197 Mich App 165, 169 (1992).

Discussion

A criminal trial must be open to the public unless the trial court enters findings that no alternative short of closure will adequately assure a fair trial for the defendant. *Richmond Newspapers, Inc v Virginia,* 448 US 555, 580–81 (1980). In determining if there is a right of access to criminal proceedings, the courts examine whether the place and process at issue have historically been open to the press and general public, and whether public access plays a significant positive role in the functioning of the process in question. *In re People v Atkins (Detroit News v Recorder's Court Judge),* 444 Mich 737, 739–40 (1994). Absent the necessary findings supporting closure, voir dire of prospective jurors, pretrial suppression hearings, and preliminary examinations must be open. *Press-Enterprise Co v Superior Court,* 464 US 501 (1984), *Waller v Georgia,* 467 US 39, 43–47 (1984), and *Press-Enterprise Co v Superior Court,* 478 US 1 (1986).

Before closing proceedings to the public and the press, a trial court must consider alternatives, including the following:

1) adoption of stricter rules governing use of the courtroom by reporters;

2) insulation or sequestration of witnesses;

3) regulation of the release of information to the press by law enforcement personnel, witnesses, or counsel;

4) a court order proscribing extrajudicial statements by any law enforcement personnel, party, witness, or court official that divulge prejudicial matters;

5) continuance of the case until the threat of news prejudicial to defendant's fair trial rights abates;

6) change of venue; and

7) sequestration of the jury.

Sheppard v Maxwell, 384 US 333, 358–63 (1966).

Parties to a criminal trial may not, by their mere agreement, empower a judge to exclude the public and press from a session of the court, and the defendant cannot waive his or her Sixth Amendment right to public trial in absolute derogation of the public interest in seeing that justice is administered openly and publicly. *Detroit Free Press v Macomb Circuit Judge,* 405 Mich 544, 546,

549 (1979), and *Detroit Free Press v Recorder's Court Judge,* 409 Mich 364, 385–93 (1980). On the rare occasion when closure may be appropriate, the court must exercise its discretion to balance the fundamental principle of open trials with the specific unusual circumstances that allegedly endanger a fair trial. *Id.* at 390. The size of the courtroom may justify limiting attendance, and it is permissible to exclude members of the public who create disturbances or are dangerous. *Id.* at 386–87. Closure orders must be narrowly tailored to the circumstances of the case. *In re Closure of Jury Voir Dire (People v Lawrence),* 204 Mich App 592, 595 (1994), and *Kline, supra* at 171.

The court may exclude witnesses for good cause when they are not testifying and, in cases involving scandal or immorality, the court for good cause may exclude minors who are not parties or witnesses. MCL 600.1420. See also MRE 615.

6.28 Motion to Suppress the Fruits of an Illegal Seizure of a Person

> **Note:** See also the following sections: 6.16 (suppression of evidence due to illegal prearraignment detention), 6.30 (exclusion of in-court identification), 6.36 (suppression of evidence obtained pursuant to a defective search warrant), and 6.37 (suppression of evidence obtained through warrantless search and seizure).

Moving Party: Defendant

Burden of Proof: If the defendant seeks to suppress evidence derived from illegal police conduct, he or she must present evidence demonstrating the illegality and establish that the derivative evidence is the "fruit" of the illegality, and that a substantial portion of the case against him or her was "a fruit of the poisonous tree." *Nardone v United States,* 308 US 338, 341 (1939). The prosecutor has the burden of proving by a preponderance of the evidence that the evidence was free of the primary taint of a defendant's illegal arrest, *Brown v Illinois,* 422 US 590, 604 (1975), and *People v Mosley (After Remand),* 400 Mich 181, 183 (1977), or that the derivative evidence inevitably would have been discovered by lawful means, *Nix v Williams,* 467 US 431, 444 (1984), *People v Stevens (After Remand),* 460 Mich 626, 637 (1999), and *People v Brzezinski,* 243 Mich App 431, 435–36 (2000), or that the evidence was discovered from a source wholly independent of the illegality. *Segura v United States,* 468 US 796, 805 (1984), *People v Smith,* 191 Mich App 644, 648–50 (1991), and *People v Harajli,* 148 Mich App 189, 194 (1986).

A motion to suppress evidence obtained from illegal police conduct should be made contemporaneously with the motion to suppress evidence directly obtained from the illegality. *People v Jones,* 66 Mich App 223, 233–34 (1975), modified on other grounds 397 Mich 871 (1976).

Discussion

The exclusionary rule prohibits use of evidence directly and indirectly obtained through a violation of an accused's constitutional rights. *Wong Sun v United States,* 371 US 471, 484–85 (1963). The United States Supreme Court noted, however, that not all evidence is inadmissible simply because it would not have come to light but for the police illegality:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* at 487–88 (citation omitted).

See also *Johnson v Louisiana,* 406 US 356, 365 (1972) (where the defendant was illegally arrested and detained following arraignment, placing him in a subsequent lineup did not exploit the illegal arrest), and *United States v Crews,* 445 US 463, 471–73 (1980) (robbery victims' in-court identification of the juvenile did not exploit the illegal arrest of the juvenile).

The exclusionary rule applies to evidence obtained as a result of a constitutionally invalid arrest; it does not apply to evidence obtained as a result of a statutorily invalid arrest. *People v Hamilton,* 465 Mich 526, 535 (2002), and *People v Lyon,* 227 Mich App 599, 610–13 (1998). The exclusionary rule does not apply to violations of Michigan's "knock and announce statute," MCL 780.656. *Stevens, supra* at 643–47, and *People v Vasquez (After Remand),* 461 Mich 235, 242 (1999). See, however, *Wilson v Arkansas,* 514 US 927, 934 (1995) (violations of common-law knock-and-announce principles should be assessed in determining the reasonableness of a search and seizure).

The Michigan Supreme Court has described the three "tiers" or levels of police-citizen encounters and the required degree of suspicion for each:

> "The first tier consists of an officer asking a person questions in a public place.
>
> > '[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. . . . Nor would the fact that the officer identifies himself as a police officer, without more,

> convert the encounter into a seizure requiring some level of objective justification. . . . The person approached, however, need not answer any questions put to him; indeed, he may decline to listen to the questions at all and may go on his way. . . . He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. . . . If there is no detention--no seizure within the meaning of the Fourth Amendment--then no constitutional rights have been infringed.'

> "The second tier of contact is the *Terry* stop . . . . As a limited exception to the general rule that all restraints of the person must be justified by probable cause, *Terry* provides that certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime.
>
> > '*Terry* and its progeny, nevertheless, created only limited exceptions to the general rule that seizures of the person require probable cause to arrest. Detentions may be 'investigative' yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest.'

"The third tier of contact is the arrest of a person based on probable cause.

> 'This Court repeatedly has explained that 'probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.'" *People v Shabaz,* 424 Mich 42, 56–58 (1985). (Citations and footnote omitted.)

A consensual encounter between an officer and a private citizen does not implicate the citizen's constitutional right to be free from unreasonable searches and seizures. An initially consensual encounter may become a seizure when, based on the information obtained and observations made, an officer develops reasonable suspicion that the citizen has been involved in criminal activity. *People v Jenkins*, 472 Mich 26, 32–33 (2005). In addition, an investigatory stop may lead to an arrest based on other information gained

and observations made. Evidence discovered as a result of a lawful arrest is properly seized at the time of the arrest. *Jenkins, supra* at 32–35.

Inculpatory evidence obtained after police officers refused a defendant's request that they leave the defendant's home is inadmissible as fruit of the poisonous tree. *People v Bolduc*, 263 Mich App 430, 443–45 (2004). In *Bolduc*, the defendant opened his door to two law enforcement officers and allowed them to enter his home. The defendant denied possessing marijuana, refused to consent to a search of his home, and asked the officers to leave. Instead of leaving, however, one of the officers began questioning the defendant about a bulge in the defendant's pocket. The defendant explained that the bulge was $6,500 from a sale he made earlier that day at the defendant's used car lot. The defendant offered to confirm the source of the money by taking the officers to the car lot to verify the sale. The defendant was unable to prove that the sum of money in his pocket was the result of a sales transaction. The defendant eventually admitted to possessing marijuana and took the officers back to his house where the defendant turned over nine bags of marijuana to the officers.

Under these circumstances, the Court of Appeals ruled that the police officers exceeded the constitutional limits of a properly conducted "knock and talk" interaction with the defendant and in doing so, created a coercive environment in which the defendant's subsequent cooperation could not be considered voluntary. *Id.* at 436–43. Applying the standard test to the facts in *Bolduc,* the Court concluded that under the totality of circumstances—the "knock and talk" encounter occurred inside the defendant's home where no real retreat was possible beyond the verbal and physical indication given by the defendant that he wished the officers to leave—a reasonable person would not have felt free to ignore the police officers' presence and go about his business. *Id.* at 441. According to the Court:

> "By failing to leave defendant's home when requested to do so, the police officers suggested that they were in control of the situation and would not accept defendant's exercise of the right to preclude them from further activity at the home.
>
> * * *
>
> "Unlike a street encounter, a person such as defendant does not have the option to test whether he is actually confined by the police conduct that he is faced with by simply walking away. Where was defendant to go to avoid the intrusion of the police upon his own property? At that point, defendant had done everything that was reasonably possible for him to convey the message that the police were no longer welcome in his home." *Id.* at 442–43.

Although the inculpatory evidence was obtained after the coercive "knock and talk" incident inside the defendant's home, the coercion tainted any evidence obtained as a result of the officers' initial visit to the defendant's home. The incriminating evidence obtained during the defendant's later "cooperation" with the officers "ensued from the police officers' improper conduct in failing to leave when requested[and was] properly suppressed as the fruit of the illegal seizure . . . ." *Id.* at 444. The Court reiterated the constitutional considerations present in such an encounter:

> "In sum, while the police are free to employ the knock and talk procedure, [*People v*]*Frohriep*, [247 Mich App 692 (2001)], they have no right to remain in a home without consent, absent some other particularized legal justification. A person is seized for purposes of the Fourth Amendment when the police fail to promptly leave the person's house following the person's request that they do so, absent a legal basis for the police to remain independent of the person's consent." *Bolduc, supra* at 444–45.

A police officer needs no probable cause or articulable suspicion to conduct a computer check of a vehicle's license plate number. *People v Jones*, 260 Mich App 424, 427–29 (2004). An investigatory stop of the vehicle is justified if a computer check reveals that the vehicle's registered owner is subject to arrest, and no visible evidence contradicts the inference that the vehicle's driver is the registered owner of the vehicle. *Id.* at 438. Provided the investigatory stop was proper and the subsequent arrest was warranted, the search of the driver's person and vehicle does not violate the Fourth Amendment's prohibition against unreasonable search and seizure, and any evidence discovered during the warrantless search was lawfully obtained. *Id.* at 430.

Although an investigative stop implicates the Fourth Amendment, an investigative stop is proper if based on a reasonable suspicion that a person has engaged or is engaging in criminal activity. *People v Oliver,* 464 Mich 184, 192 (2001).

For Fourth Amendment purposes, a "seizure" of a person occurs when a reasonable person, innocent of any crime, would have believed that he or she was not free to leave. *Brower v Inyo County,* 489 US 593, 595–98 (1989). A seizure involves "an intentional acquisition of physical control" of a person by a law enforcement officer. *Id.* at 596. If a suspect flees, he or she is not "seized" under the Fourth Amendment to the U.S. Constitution until he or she submits or is forced to submit to police authority. Mere police pursuit of a fleeing suspect does not constitute a seizure; thus, evidence abandoned by the fleeing suspect does not fall within the ambit of the Fourth Amendment. *California v Hodari D,* 499 US 621, 626, 629 (1991), *People v Lewis,* 199 Mich App 556, 558–60 (1993), and *United States v Martin,* 399 F3d 750, 752–53 (CA 6, 2005).

Probable cause is required for an arrest; "arrests" for questioning or investigation are illegal. See *Dunaway v New York,* 442 US 200, 206–16 (1979), and *People v Kelly,* 231 Mich App 627, 633–34 (1998). If a person has been arrested without probable cause, evidence obtained following the arrest may be excluded as a fruit of that arrest. However, the illegal arrest must be employed as a tool to directly procure evidence to warrant its suppression. *Kelly, supra* at 634, quoting *People v Mallory,* 421 Mich 229, 240–41, 243 n 8 (1984). The prosecutor must show that there was no causal connection between the illegal arrest and the discovery of the evidence. *People v Martin,* 94 Mich App 649, 653 (1980). A confession must be voluntary *and* "'sufficiently an act of free will to purge the primary taint.'" *Brown, supra,* 422 US at 602, quoting *Wong Sun, supra,* 371 US at 486. Where the police have probable cause to arrest a suspect but enter the suspect's home without a warrant, consent, or exigent circumstances, the exclusionary rule does not require suppression of the suspect's statements made outside his or her home. *New York v Harris,* 495 US 14, 21 (1990), and *People v Dowdy,* 211 Mich App 562, 568–70 (1995).

In *Brown, supra,* 422 US at 603–04, the United States Supreme Court set forth a non-exhaustive list of factors to determine whether the police have exploited an illegal arrest to obtain a confession:

1) The giving of *Miranda* warnings does not purge the confession of the taint of the illegal arrest. *Id.* at 603, *Dunaway, supra,* 442 US at 218–19, and *Martin, supra.*

2) The lapse of time between the defective arrest and the giving of the confession. *Martin, supra,* and *People v Spinks,* 206 Mich App 488, 496–97 (1994).

3) The presence of any intervening factors, such as the defendant being free to leave and returning later of his own volition, *Wong Sun, supra,* 371 US at 491, or the defendant volunteering a statement without any police prompting or questioning, *Rawlings v Kentucky,* 448 US 98, 108–09 (1980). A lineup is not an intervening circumstance that tends to dissipate the taint. *Mallory, supra,* and *People v Casey,* 102 Mich App 595, 604 n 6 (1980), aff'd 411 Mich 179 (1989). The development in the interim of probable cause to arrest may dissipate the taint of the initial illegal arrest. *Kelly, supra* at 634–37, and *People v Hampton,* 138 Mich App 235, 238 (1984).

4) The purpose and flagrancy of the official misconduct that rendered the initial arrest defective. *Brown, supra,* 422 US at 605, and *Spinks, supra.*

A court may also consider events occurring before the arrest. *People v Emanuel,* 98 Mich App 163, 177–79 (1980) (defendant's intention to "turn himself in" is sufficient to attenuate the connection between illegal arrest and subsequent confession).

The "independent source doctrine" may permit introduction of tainted evidence despite the exclusionary rule if the government can show that the same evidence was subject to discovery on the basis of information completely separate from information obtained unlawfully. *United States v Jenkins*, 396 F3d 751, 757 (CA 6, 2005) (evidence was admissible because information contained in the affidavit was sufficient to show probable cause so that a valid warrant would have issued even without using information obtained in violation of a defendant's Fourth Amendment rights).

The "inevitable discovery" doctrine may be used to avoid exclusion of physical evidence derived from an illegal arrest. *Nix v Williams,* 467 US 431, 444 (1984), and *People v Thomas,* 191 Mich App 576, 580–83 (1991). However, in *Thomas, supra* at 584, the Court of Appeals stated that "the inevitable discovery doctrine ordinarily cannot be applied to justify the admission into evidence of a tainted confession."

6.29 Motion to Withdraw Guilty Plea

*For further discussion, see Hummel, Criminal Procedure Monograph 3, *Misdemeanor Arraignments & Pleas—Third Edition* (MJI, 2006), Sections 3.23(B), 3.29, 3.38, and 3.39, and Johnson, *Michigan Circuit Court Benchbook* (MJI, 2004), Sections 4.35–4.36.

Moving Party: Defendant*

Burden of Proof: The defendant has an absolute right to withdraw a guilty plea before the court accepts it on the record. MCR 6.310(A). The defendant may have a right to withdraw a guilty plea after acceptance but before sentence as provided in MCR 6.310(B), which states:

> **"(B) Withdrawal After Acceptance but Before Sentence.** After acceptance but before sentence,
>
> > (1) a plea may be withdrawn on the defendant's motion or with the defendant's consent only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by subrule (C).
> >
> > (2) the defendant is entitled to withdraw the plea if
> >
> > (a) the plea involves a prosecutorial sentence recommendation or agreement for a specific sentence, and the court states that it is unable to follow the agreement or recommendation; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea; or

> (b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose."

For withdrawal under MCR 6.310(B)(1), the defendant must show "a fair and just reason for withdrawal of the plea." If the defendant establishes a ground for withdrawal under MCR 6.310(B)(1), the prosecutor who opposes withdrawal must show that withdrawal will substantially prejudice the prosecutor because of reliance on the plea. *Id.* and *People v Jackson*, 203 Mich App 607, 611–12 (1994).

Discussion

There is no absolute right to withdraw a guilty plea once it has been accepted. *People v Harris*, 224 Mich App 130, 131 (1997). Withdrawal of a plea in the interest of justice pursuant to MCR 6.310(B)(1) is discretionary with the trial court. *People v Spencer*, 192 Mich App 146, 150 (1991). To establish that withdrawal is in the interest of justice, the defendant must show a fair and just reason for withdrawal. *Id.* Inducement of a plea by inaccurate legal advice, the defendant's misunderstanding of the ramifications of trial, ineffective assistance of counsel, and the defendant's inability personally to recount a sufficient basis for the plea may support a finding that withdrawal is in the interest of justice. *Id*. at 151–52. Concern about the potential penalty is not a sufficient basis for withdrawal of a guilty plea. *People v Lafay*, 182 Mich App 528, 530 (1990). The discarding of vital physical evidence or the death of a chief government witness may support a finding that the prosecutor has been substantially prejudiced because of reliance on a plea; trial preparations and costs are also appropriate considerations in evaluating prejudice. *Spencer*, *supra* at 150–52.

Doubt about the veracity of a defendant's nolo contendere plea, by itself, is not an appropriate reason to permit the defendant to withdraw an accepted plea before sentencing. *People v Patmore*, 264 Mich App 139, 152 (2004). In *Patmore*, the defendant moved to withdraw his no contest plea on the basis that the complainant had recanted her preliminary examination testimony on which the defendant's plea was based. The Court explained that

> "for recanted testimony, which provided a substantial part of the factual basis underlying a defendant's no-contest plea, to constitute a fair and just reason for allowing the defendant to withdraw his plea, at a minimum, the defendant must prove by a preponderance of credible evidence that the original testimony was indeed untruthful. If the defendant meets this burden, the trial court must then determine whether other evidence is sufficient to support the factual basis of the defendant's plea. If the defendant

> fails to meet this burden or if other evidence is sufficient to support the plea, then the defendant has not presented a fair and just reason to warrant withdrawal of his no-contest plea. Even if the defendant presents such a fair and just reason, prejudice to the prosecution must still be considered by the trial court [internal citations omitted]." *Patmore, supra*.

A defendant who escapes from custody before sentencing waives the right to withdraw his or her guilty plea based on the judge's failure to follow a sentence recommendation. *People v Garvin*, 159 Mich App 38, 43 (1987).

If a defendant withdraws his or her plea, he or she may be tried on the original charges or on any charges that could have been brought if the plea had not been entered. MCR 6.312.

If a defendant has pled guilty in reliance on a bargain with the prosecution, should the prosecution not honor the agreement, the courts must specifically enforce the agreement if it can be fulfilled, or if the agreement can no longer be fulfilled, the defendant must be allowed to withdraw his or her plea. *Guilty Plea Cases,* 395 Mich 96, 127 (1975).

However, because no defendant has a right to plead guilty, let alone any right to a plea bargain, *People v Grove,* 455 Mich 439, 469 n 36, 471 (1997), the right to specific performance of a plea agreement does not inure to the defendant "until after he has pled guilty or performed part of the plea agreement to his prejudice in reliance upon the agreement. *In re Robinson,* 180 Mich App 454, 459 (1989). "Detrimental reliance" occurs only when a defendant does exactly what he or she promised—substantial compliance is insufficient. *People v Walton,* 176 Mich App 821, 825–26 (1989), *People v Lombardo,* 216 Mich App 500, 511 (1996), and *People v Hannold,* 217 Mich App 382 (1996). There must also be "no other remedy . . . available which will return the defendant to the position he enjoyed prior to making the agreement at issue. *People v Gallego,* 430 Mich 443, 456 n 10 (1988).

There may, however, be an exception to the rules stated above. In *People v Mooradian,* 221 Mich App 316, 319–20 (1997), and *People v Sawyer,* 215 Mich App 183, 195–96 (1996), the Court of Appeals held that MCR 2.507(H) applies in criminal cases. That subrule has long been recognized as making binding in a civil case any final settlement, as well as lesser agreements, e.g., regarding authentication of documents, order of witnesses, etc., placed on the record in open court or memorialized in a writing signed by the person against whom the settlement is sought to be enforced or by that person's attorney.

The prosecutor may seek to set aside a plea if the defendant has failed to comply with the terms of a plea agreement. MCR 6.310(E).

6.30 Motion to Suppress Eyewitness Identification at Trial Because of Illegal Pretrial Identification Procedure

Moving Party: Defendant

Burden of Proof: The defendant has the burden of establishing that his or her right to counsel was violated. *People v Morton,* 77 Mich App 240, 244 (1977). The prosecuting attorney has the burden of showing that the defendant waived his or her right to counsel. *United States v Wade*, 388 US 218, 237 (1967) (an intelligent waiver of the right to counsel must be shown), and *People v Daniels,* 39 Mich App 94, 96–97 (1972) (prosecutor proved by clear and convincing evidence that the defendant voluntarily, knowingly, and intelligently waived his right to assistance of counsel at a lineup). If counsel was not present, the prosecutor must establish that the procedure was not unduly suggestive. If counsel was present, the defendant has the burden of proving that the procedure was unduly suggestive. *People v Young,* 21 Mich App 684, 693–94 (1970).

If the court finds a violation of the right to counsel or that a pretrial identification procedure was unduly suggestive, in-court identification of the defendant at trial is inadmissible as the fruit of the illegal procedure unless the prosecution establishes by clear and convincing evidence that the in-court identification is based upon observations of the suspect other than the illegal pretrial identification. *Wade*, *supra*, 388 US at 240, and *People v Gray,* 457 Mich 107, 115 (1998).

Discussion

An evidentiary hearing must be held where the defendant claims that a pretrial identification procedure was constitutionally improper. See *People v Piscunere,* 26 Mich App 52, 55 (1970), and *People v Johnson,* 202 Mich App 281, 285 (1993) (no hearing is required where it is apparent that the challenges are insufficient to raise a constitutional question or where the defendant does not substantiate the allegations with factual support). The defendant has a right to testify at the hearing "for the limited purpose of making a record of his version of the facts and circumstances regarding the lineup." *Piscunere, supra* at 56.

1. Right to Counsel

There is a federal constitutional right to counsel at a corporeal lineup. *Wade, supra,* and *Gilbert v California,* 388 US 263 (1967). A defendant's right to counsel at corporeal identifications attaches at the time adversarial judicial criminal proceedings are initiated against that defendant. *People v Hickman*, 470 Mich 602, 609 n 4 (2004). In *Hickman*, the challenged identification took place "on-the-scene" and before the initiation of adversarial proceedings; therefore, counsel was not required. The Michigan Supreme Court's decision in *Hickman* overruled the Court's previous decision in *People v Anderson*, 389 Mich 155 (1973), where "the right to counsel was extended to all pretrial

corporeal identifications, including those occurring before the initiation of adversarial proceedings." *Hickman, supra* at 606. Adopting the U.S. Supreme Court's holding in *Moore v Illinois,* 434 US 220, 226–27 (1977), the *Hickman* Court stated that

> "it is now beyond question that, for federal Sixth Amendment purposes, the right to counsel attaches only at or after the initiation of adversarial judicial proceedings.
>
> This conclusion is also consistent with our state constitutional provision, Const 1963, art 1, § 20[.]" *Hickman, supra* at 607–08.

The Court added that "identifications conducted before the initiation of adversarial judicial criminal proceedings could still be challenged" on the basis that a defendant's due process rights were violated by the identification's undue suggestiveness or by other factors unfairly prejudicial to the defendant. *Id.,* citing *Moore, supra,* 434 US at 227.

Counsel is required at a photographic showup when the accused is in custody, but not when police have not yet arrested the accused or focused their investigation on the accused alone. *People v Kurylczyk,* 443 Mich 289, 301–02 (1993).

2. Impermissible Suggestiveness and Due-Process Limitations

Substantive evidence concerning any "pre-indictment" identification procedure is inadmissible if the procedure is so unnecessarily suggestive and conducive to irreparable misidentification that it amounts to a denial of due process. *Stovall v Denno,* 388 US 293, 302 (1967), and *Kurylczyk, supra* at 302–11 (photographic identifications).

Physical differences among a suspect and other lineup participants do not alone establish impermissible suggestiveness; such differences are significant only when apparent to the witness and when they serve to substantially distinguish the defendant from the other participants. *People v Hornsby,* 251 Mich App 462, 466 (2002). Physical differences generally affect the weight rather than the admissibility of identification evidence. *People v Sawyer,* 222 Mich App 1, 3 (1997). See also *Kurylczyk, supra* at 304–05, 311–14 (appearance of the accused in a lineup wearing the same clothes as allegedly worn during the commission of the offense does not automatically render a procedure impermissibly suggestive).

Where the witness has failed to identify the accused in a pretrial identification procedure, a later confrontation during a preliminary examination will not be held to be impermissibly suggestive per se. *People v Barclay,* 208 Mich App 670, 675–76 (1995), *People v Solomon,* 47 Mich App 208, 216–21 (1973),

and *People v Whitfield,* 214 Mich App 348, 351 (1995) (confrontation during juvenile waiver hearing).

The suggestiveness of an identification procedure is determined by considering the totality of the circumstances surrounding the procedure. *Stovall, supra,* 388 US at 301–02, and *People v Lee,* 391 Mich 618, 626 (1974). In ascertaining whether a pretrial identification procedure is impermissibly suggestive, a court must look to the totality of the circumstances, especially the time between the criminal act and the procedure, and the duration of the witness's contact with the perpetrator during commission of the offense. *People v Johnson,* 58 Mich App 347, 352–55 (1975), and *Neil v Biggers,* 409 US 188, 199 (1972).

Absent any improper suggestions or the provision of a photograph of the defendant following the complainant's failure to make a definitive identification of the defendant at a lineup, a prosecutor's post-lineup communication with the complainant did not violate the defendant's due process rights. *People v Harris*, 261 Mich App 44, 50–53 (2004).

3. Consequences of Violation

If the pretrial identification procedures are impermissibly suggestive or conducive to irreparable misidentification, testimony as to the out-of-court identification must be excluded. *Gilbert, supra,* 388 US at 273. In-court identification is only permissible if the prosecuting attorney shows by clear and convincing evidence that the in-court identification has a basis independent of the illegal lineup. *Wade*, *supra*, 388 US at 240, *Manson v Braithwaite,* 432 US 98 (1977), and *Anderson, supra* at 167.

These factors must be considered when determining whether an in-court identification has an independent basis:

1) prior relationship with or knowledge of the defendant;

2) the opportunity to observe the offense, including such factors as the length of time of the observation, lighting, noise, or other factors affecting sensory perception and proximity to the alleged criminal act;

3) length of time between the offense and the disputed identification;

4) accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description;

5) any previous proper identification or failure to identify the offender;

6) any identification prior to the lineup or showup of another person as defendant;

7) the nature of the alleged offense and the physical and psychological state of the witness, including such factors as fatigue, nervous exhaustion, intoxication, age, and intelligence of the witness; and

8) any idiosyncratic or special features of the defendant. *People v Kachar,* 400 Mich 78, 95–96 (1977).

6.31 Motion in Limine—Impeachment of Defendant by Evidence of Prior Convictions

Moving Party: Defendant or prosecutor

Burden of Proof: If a prior conviction contains no element of dishonesty, false statement, or theft, evidence of the prior conviction is not admissible for impeachment purposes. If a prior conviction contains an element of dishonesty or false statement, evidence of the prior conviction is admissible if more than ten years have not elapsed since the date of the conviction or the defendant's release from confinement, whichever is later. MRE 609(a) and MRE 609(c). The trial court has discretion to admit evidence of prior convictions for impeachment purposes if the prior conviction is a theft offense punishable by imprisonment for more than one year and the time requirement of MRE 609(c) is satisfied. MRE 609(a)(2)(A). If the prior conviction is such a theft offense, the court must balance its probative value and prejudicial effect. MRE 609(a)(2)(B). The prosecutor bears the burden of justifying admission of the evidence. *People v Crawford*, 83 Mich App 35, 38 (1978).

Discussion

MRE 609 provides in part:

> **"(a) General Rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and
>
> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
>
> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a

> criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.
>
> **"(b) Determining Probative Value and Prejudicial Effect.** For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.
>
> **"(c) Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date."

MRE 609(d) addresses the effect of pardons, annulments and certificates of rehabilitation, MRE 609(e) addresses evidence of juvenile adjudications, and MRE 690(f) discusses the effect of the pendency of an appeal from a conviction.

MRE 609 sets forth a bright-line rule excluding evidence of all prior convictions for impeachment if they do not contain an element of dishonesty, false statement, or theft. The rule that evidence of all other convictions is not admissible for impeachment purposes recognizes that crimes not containing elements of dishonesty, false statement, or theft have no strong relationship to credibility and have strong potential for prejudice. *People v Allen*, 429 Mich 558, 596 (1988).

The first task for the trial court is to determine if the prior conviction is for an offense containing an element of dishonesty or false statement. If so, exclusion of evidence of that prior conviction for impeachment purposes is not permitted, assuming satisfaction of the time requirement of MRE 609(c). MRE 609(a)(1). This rule of admissibility recognizes that crimes containing an element of dishonesty or false statement are directly probative of a witness' truthfulness, have high probative value, and are inherently more probative than prejudicial. Crimes in this category contain elements of deceit, untruthfulness, and falsification, and include, but are not limited to, perjury, subornation of perjury, false statement, criminal fraud, embezzlement, and false pretenses. Crimes of thievery may or may not contain an element of dishonesty or false statement for purposes of MRE 609(a)(1). The prejudicial effect of evidence of prior convictions containing an element of dishonesty or false statement is irrelevant for purposes of MRE 609. *Allen*, *supra* at 593–95,

605, and *People v Parcha*, 227 Mich App 236, 243–46 (1997) (evidence of a prior conviction of misdemeanor larceny is not admissible under MRE 609(a)(1); whether misdemeanor retail fraud involves dishonesty or false statement depends on the specific factual underpinnings of the conviction).

If the prior conviction does not contain an element of dishonesty or false statement, the court must determine if it contains an element of theft. If not, evidence of the prior conviction is not admissible. If it does contain an element of theft, evidence of the prior conviction may be admissible. If the prior conviction containing an element of theft was not punishable by imprisonment for more than one year, evidence of that conviction is not admissible. If the prior conviction containing an element of theft was punishable by imprisonment for more than one year, admission of evidence of the prior conviction to impeach the defendant is discretionary with the trial court. In exercising his or her discretion in determining the admissibility of the prior theft-related conviction punishable by more than one year's imprisonment, the trial court must determine whether the probative value of the evidence outweighs its prejudicial effect. In determining probative value, the trial court may consider only two factors: the degree to which the prior crime is indicative of veracity and the vintage of the prior conviction. For purposes of the determination of probative value, the offense of armed robbery, for example, is considered less indicative of veracity than some other theft-related offenses. The more recent the prior conviction, the greater its probative value. It is not permissible to consider the parties' need for the evidence in determining its probative value. In assessing the prejudicial effect of the evidence, the court may consider only two factors: the similarity between the prior conviction and the charged offense, and the importance of the defendant's testimony to the decisional process. The more similar the prior conviction and the current charge, the greater is the prejudicial effect of the evidence. As the importance of the defendant's testimony increases, the prejudicial effect of the evidence also increases. If the defendant's testimony is the sole means for presentation of the defense version of the facts, for example, the prejudicial effect of evidence of a prior conviction is heightened. Evidence of a prior theft-related offense is not admissible unless its probative value outweighs its prejudicial effect. *Allen*, *supra* at 605–06, 610–11, *People v Cross*, 202 Mich App 138, 146–47 (1993), and *People v Bartlett*, 197 Mich App 15, 19–20 (1992).

The balancing of probative value and prejudicial effect is addressed to the discretionary authority of the trial court and applies only to certain prior theft convictions and only if the witness is a criminal defendant. *Allen*, *supra* at 596, 606–07.

MRE 609(c) prohibits admission of evidence of any prior conviction if more than ten years have elapsed since the date of the conviction or since the date of the witness' release from confinement for that conviction, whichever is later. *People v Coddington*, 188 Mich App 584, 595–96 (1991). There is no requirement that the defendant have been sentenced on the prior conviction before trial on the current charge, and the prior conviction need not have

involved events preceding the events which gave rise to the current trial. *People v Kennebrew*, 220 Mich App 601, 606 (1996), and *Hurt v Michael's Food Center*, 220 Mich App 169, 176–77 (1996).

6.32 Motion in Limine—Impeachment of Defendant by His or Her Silence

Moving Party: Defendant or prosecutor

Burden of Proof: The general rule is that the party proffering evidence must establish its admissibility.

Discussion

If a defendant's silence is attributable to invocation of the Fifth Amendment privilege against self-incrimination or to reliance on *Miranda* warnings,* admission of evidence of that silence is error. *People v McReavy*, 436 Mich 197, 201 (1990). Admission of evidence of a defendant's silence during contact with the police that does not occur at the time of arrest and in the face of accusation does not violate the Fifth Amendment or the Michigan Constitution. *People v Collier*, 426 Mich 23, 39 (1986), and *People v Cetlinski*, 435 Mich 742, 746–47, 759–60 (1990), clarifying *People v Bobo*, 390 Mich 355 (1973). A defendant's silence, not in the face of accusation, may be admissible as conduct evidence to impeach the defendant's testimony that he or she was an innocent bystander. *People v Hackett*, 460 Mich 202, 215–16 (1999), clarifying *People v Bigge*, 288 Mich 417 (1939). Evidence of nonresponsive conduct or silence that did not occur during custodial interrogation or in reliance on *Miranda* warnings may be admissible as evidence of consciousness of guilt. *People v Solmonson*, 261 Mich App 657, 664–67 (2004), and *People v Schollaert*, 194 Mich App 158, 160–67 (1992).

*See Section 6.18, above, for a discussion of *Miranda.*

Cross-examination of a defendant concerning his or her prearrest failure to give the police the version of the events in question that the defendant later offers at trial, or concerning omissions within prearrest statements voluntarily given to the police during their investigation, may be admissible if it would have been natural for the defendant to come forward with the story which was later related at trial. *Collier*, *supra* at 34–36, 39, and *Cetlinski*, *supra* at 746–47, 760–61.

Evidence of a defendant's behavior and demeanor during a custodial interrogation after a valid waiver of his or her Fifth Amendment privilege against compulsory self-incrimination is admissible. When a defendant speaks after receiving *Miranda* warnings, a momentary pause or failure to answer a question does not constitute invocation of the right to remain silent. *McReavy*, *supra* at 200, 221–22. If a defendant was generally prepared to talk to the police and did so, the defendant's statements, the manner in which those statements were phrased and the defendant's varying degrees of candor may be appropriate matters for jury consideration. *People v Sholl*, 453 Mich 730,

738 (1996). See also *People v Rice (On Remand)*, 235 Mich App 429, 435–37 (1999) (when defendant was given *Miranda* warnings, waived his Fifth Amendment right to remain silent, answered some questions posed to him by the police, and then was silent but did not verbally invoke his right to be silent or state that he did not want to answer more questions, a police officer's testimony concerning the defendant's nonverbal conduct and silence is not an impermissible commentary on the defendant's silence).

A defendant who testifies that he or she made a statement to the police that was consistent with his or her trial testimony may be impeached with evidence that no such statement was made. *People v Sutton (After Remand)*, 436 Mich 575, 591–600 (1990).

A defendant must testify at trial to preserve for appellate review his or her challenge to the trial court's ruling in limine permitting the prosecution to introduce evidence of the defendant's post-*Miranda* silence. *People v Boyd*, 470 Mich 363, 365 (2004). The requirement that a defendant testify in order to contest the admission of his or her post-*Miranda* silence is necessary because a defendant's post-*Miranda* silence *is* admissible in one very specific context—to rebut a defendant's assertion at trial that he or she told the police something contrary to what actually occurred during the defendant's statement to police. *Id*., citing *Doyle v Ohio,* 426 US 610 (1976).

6.33 Notice and Examination Requirements for Asserting an Insanity Defense

Moving Party: Defendant

Burden of Proof: "It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense." MCL 768.21a(1). "The defendant has the burden of proving the defense of insanity by a preponderance of the evidence." MCL 768.21a(3).

If the defendant properly asserts an insanity defense, the trier of fact may find him or her "guilty but mentally ill"* if the trier of fact finds all of the following:

> "(a) The defendant is guilty beyond a reasonable doubt of an offense.
>
> "(b) The defendant has proven by a preponderance of the evidence that he or she was mentally ill at the time of the commission of that offense.
>
> "(c) The defendant has not established by a preponderance of the evidence that he or she lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.36(1)(a)–(c).

*In contrast to a "not guilty by reason of insanity" verdict, a "guilty but mentally ill" verdict does not absolve a defendant of criminal responsibility; instead, it affords the defendant psychiatric treatment as part of his or her sentence. MCL 768.36(3)–(4).

Discussion

1. Definition of "Legal Insanity"

MCL 768.21a(1)–(2) state in part as follows:

> "(1) . . . An individual is legally insane if, as a result of mental illness . . . , or as a result of being mentally retarded . . . , that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity.
>
> "(2) An individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances."

"'Mental illness' means a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. MCL 330.1400(g). "'Mental retardation' means significantly subaverage general intellectual functioning that originates during the developmental period and is associated with impairment in adaptive behavior." MCL 330.2001a(6).

Note: MCL 768.21a(1) references MCL 330.1400a for the definition of "mental illness." This statute was repealed by 1995 PA 290. For purposes of the insanity statute, the definition in MCL 330.1400(g) should be used. *People v Mette*, 243 Mich App 318, 325 (2000). Similarly, "mentally retarded" is no longer defined in MCL 330.1500 as referenced in MCL 768.21a(1). However, a substantially similar definition of "mentally retarded" appears in MCL 330.2001a(6) of the Mental Health Code.

"[A] 'settled condition of insanity' caused by [voluntary] drug abuse, even if *temporary* in nature, may nevertheless be legal insanity if the condition was not limited merely to periods of intoxication." *People v Conrad,* 148 Mich App 433, 439 (1986) (the trial court erroneously precluded defendant's insanity defense, which was based on the effects of defendant's voluntary ingestion of phencyclidine (PCP or "angel dust") for two weeks prior to the offense).*

*For a more complete discussion of the insanity defense, see Smith, *Sexual Assault Benchbook* (MJI, 2002), Section 4.10(A)(3)–(4).

"[T]he Legislature's enactment of a comprehensive statutory scheme concerning defenses based on either mental illness or mental retardation demonstrates the Legislature's intent to preclude the use of *any* evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent." *People v Carpenter*, 464 Mich 223, 236 (2001). Thus, the defense of "diminished capacity" has been abrogated in Michigan. *Id.* at 237.

2. Notice and Examination Requirements

The defendant in a felony case must file and serve on the prosecutor and the court written notice of intent to claim an insanity defense no less than 30 days before the trial date, or at such other time as the court directs. MCL 768.20a(1).

Upon receipt of the notice, the trial court must order examination of the defendant for a period not to exceed 60 days by the Center for Forensic Psychiatry or other qualified personnel. MCL 768.20a(2). Both parties also may obtain independent psychiatric examinations. MCL 768.20a(3). See, however, *People v Smith,* 103 Mich App 209, 210–11 (1981) (the trial court properly denied defendant's request for an independent examination made on the first day of trial). If the defendant is indigent, he or she is entitled to *one* independent examination at public expense. *Id.* and *Ake v Oklahoma,* 470 US 68, 78–79, 83 (1985).

The trial court has discretion to allow defense counsel to be present during an examination conducted at the request of the prosecuting attorney. *People v Martin,* 386 Mich 407, 429 (1971).

After the examination is conducted, the examiner(s) must prepare a written report and submit it to the prosecuting attorney and defense counsel. MCL 768.20a(6). The report must contain the following information:

> "(a) The clinical findings of the center [for forensic psychiatry], the qualified personnel, or any independent examiner.
>
> "(b) The facts, in reasonable detail, upon which the findings were based.
>
> "(c) The opinion of the center or qualified personnel, and the independent examiner on the issue of the defendant's insanity at the time the alleged offense was committed and whether the defendant was mentally ill or mentally retarded at the time the alleged offense was committed." MCL 768.20a(6)(a)–(c).

Within 10 days of receipt of the report from the forensic center or from the prosecutor's independent examiner, whichever occurs later, but no less than five days before trial, or at such other time as the court directs, the prosecutor must file and serve notice of rebuttal, including witnesses' names. MCL 768.20a(7).

MCL 768.21(1)–(2) allow the court to exclude evidence offered by the defendant or prosecuting attorney for the purpose of establishing or rebutting an insanity defense. If the required notice is not filed and served at all, the court must exclude the proffered evidence. In addition, if the notice given by the defendant or the prosecuting attorney does not state, as particularly as is known to the party, the name of a witness to be called to establish or rebut the defense, the court must exclude the testimony of the witness.

However, strict compliance with the statutory notice requirements regarding an insanity defense may not be necessary, where the parties have actual notice of witnesses who may be called and no surprise will result from the noncompliance. *People v Blue,* 428 Mich 684, 690 (1987), *People v Stinson,* 113 Mich App 719, 723–26 (1982) (the trial court properly ordered a one-week adjournment of trial to allow the prosecutor to file a notice of rebuttal, where defense counsel was aware of the prosecutor's intent to call an expert witness), and *People v Jurkiewicz,* 112 Mich App 415, 417 (1982) (prosecutor's failure to file notice of rebuttal or request permission to file a late notice of rebuttal required exclusion of witness's testimony).

3. Required Cooperation With the Examination

If the defendant has been released from custody before trial, he or she must make himself or herself available for examination "at the time and place established by the center [for forensic psychiatry] or the other qualified personnel." MCL 768.20a(2). If the defendant fails to make himself or herself available, the court may order the defendant's commitment to the forensic center without a hearing. *Id.*

The defendant must fully cooperate in an examination by the Center for Forensic Psychiatry, other qualified personnel, or independent examiners for the defense or prosecution. MCL 768.20a(4). If the defendant fails to cooperate during the examination, and the failure is "established to the satisfaction of the court at a hearing prior to trial, the defendant shall be barred from presenting testimony relating to his or her insanity at the trial of the case." *Id.* See *People v Hayes,* 421 Mich 271, 282 (1985) (statute does not deny a defendant his or her right to present a defense).

4. Admissibility of a Defendant's Statements Made During Examination

MCL 768.20a(5) states as follows:

> "Statements made by the defendant to personnel of the center for forensic psychiatry, to other qualified personnel, or to any independent examiner during an examination shall not be admissible or have probative value in court at the trial of the case on any issues other than his or her mental illness or insanity at the time of the alleged offense."

Statements made during an examination cannot be used to impeach the defendant. *People v Toma,* 462 Mich 281, 293 (2000).

5. Pleas of "Guilty but Mentally Ill" and "Not Guilty by Reason of Insanity"

With the consent of the court and prosecuting attorney, a defendant may plead "guilty but mentally ill" or "not guilty by reason of insanity." MCR 6.301(A) and (C). The defendant must have asserted an insanity defense and undergone an examination and otherwise complied with MCL 768.20a. MCR 6.301(C) and MCL 768.36(2).

MCR 6.303 states:

> "Before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302. In addition to establishing a factual basis for the plea pursuant to MCR 6.302(D)(1) or (D)(2)(b), the court must examine the psychiatric reports prepared and hold a hearing that establishes support for a finding that the defendant was mentally ill at the time of the offense to which the plea is entered. The reports must be made a part of the record."

The defendant must prove by a preponderance of the evidence that he or she was mentally ill at the time of the offense. MCL 768.36(2).

MCR 6.304(A) provides that before accepting a plea of not guilty by reason of insanity, the court must comply with the requirements of MCR 6.302 except that MCR 6.304(C), rather than MCR 6.302(D), governs the manner of determining the accuracy of the plea.

MCR 6.304(B) states:

> **"(B) Additional Advice Required.** After complying with the applicable requirements of MCR 6.302, the court must advise the defendant, and determine whether the defendant understands, that the plea will result in the defendant's commitment for diagnostic examination at the center for forensic psychiatry for up to 60 days, and that after the examination, the probate court may order the defendant to be committed for an indefinite period of time."

MCR 6.304(C)(1)–(2) contain the requirements for determining the accuracy of the plea.

> **"(C) Factual Basis.** Before accepting a plea of not guilty by reason of insanity, the court must examine the psychiatric reports prepared and hold a hearing that establishes support for findings that:
>
> (1) the defendant committed the acts charged, and
>
> (2) that, by a preponderance of the evidence, the defendant was legally insane at the time of the offense."

MCR 6.304(D) states:

> **"(D) Report of Plea.** After accepting a defendant's plea, the court must forward to the center for forensic psychiatry a full report, in the form of a settled record, of the facts concerning the crime to which the defendant pleaded and the defendant's mental state at the time of the crime."

6.34 Motion to Quash Information for Improper Bindover

*For further discussion, see Smith, Criminal Procedure Monograph 5, *Preliminary Examinations—Third Edition* (MJI, 2006), Section 5.43, and Johnson, *Michigan Circuit Court Benchbook* (MJI, 2004), Section 4.7.

Moving Party: Defendant*

Burden of Proof: If the defendant challenges the factual sufficiency of the evidence presented at the preliminary examination, the defendant must establish that the examining magistrate abused his or her discretion in binding over the defendant for trial in circuit court. If the defendant challenges the bindover on legal grounds, the decision is reviewed for error. *People v Thomas*, 438 Mich 448, 452 (1991).

Discussion

MCR 6.110(E) provides in pertinent part:

> **"(E) Probable Cause Finding.** If, after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it, the court must bind the defendant over for trial."

MCL 766.13 provides in pertinent part:

> "If it shall appear to the magistrate at the conclusion of the preliminary examination that a felony has been committed and there is probable cause for charging the defendant therewith, the magistrate shall forthwith bind the defendant to appear before the circuit court . . . for trial."

The district court has a duty to bind the defendant over to circuit court for trial if the court finds that a felony has been committed and probable cause that the defendant committed it. *People v Stone*, 463 Mich 558, 561 (2001), and *People v Goecke*, 457 Mich 442, 469 (1998). Probable cause exists where the court finds a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to warrant a cautious person to believe that the defendant is guilty of the charged offense. *People v Orzame*, 224 Mich App 551, 558 (1997), and *People v Reigle*, 223 Mich App 34, 37 (1997). Guilt beyond a reasonable doubt need not be proved at the preliminary examination. *Id*. To justify bindover, there must be some evidence from which each element of the charged offense may be inferred. If the credible evidence conflicts and raises a reasonable doubt as to the defendant's guilt, the issue of guilt or innocence should be left to the trier of fact. *People v King*, 412 Mich 145, 153–54 (1981), *Goecke*, *supra* at 469–70, and *Reigle*, *supra* at 37. In determining whether to bind the defendant over to circuit court, the examining magistrate must determine the weight and competency of the evidence and the credibility of witnesses. *People v Paille #2*, 383 Mich 621, 627 (1970), *People v Talley*, 410 Mich 378, 386 (1981), overruled in part on other grounds 457 Mich 266, 276 (1998), and *King*, *supra* at 153. The magistrate must make his

or her determination after examination of the whole matter and may consider evidence offered in defense. *Id*. at 153–54. Only legally admissible evidence may be considered. *People v Kubasiak*, 98 Mich App 529, 536 (1980).

An abuse of discretion is found if the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but defiance of judgment, not the exercise of reason but of passion or bias. *Talley*, *supra* at 387. If an unprejudiced person, considering the facts upon which the court acted, would conclude that there was no justification or excuse for the ruling, the ruling reflects an abuse of discretion. *Orzame*, *supra* at 557, and *Reigle*, *supra* at 36–37.

A defendant may not appeal a trial court's ruling on his motions to quash several charges against him after he was convicted of the charges at trial. *People v Wilson*, 469 Mich 1018 (2004).

6.35 Motion to Admit Evidence of Victim's Prior Sexual Conduct in Criminal Sexual Conduct Cases

Moving Party: Defendant*

*For a more complete discussion, see Smith, *Sexual Assault Benchbook* (MJI, 2002), Section 7.2.

Burden of Proof: If the defendant in a criminal sexual conduct case proposes to offer evidence of the victim's past sexual conduct with the defendant or evidence of specific instances of sexual activity to show the source or origin of semen, pregnancy, or disease, the defendant must file a written motion and offer of proof within 10 days after arraignment. MCL 750.520j(2). Violation of this time requirement may result in preclusion of the proposed evidence. *People v Lucas (On Remand),* 193 Mich App 298, 301 (1992) and *People v Lucas (After Remand),* 201 Mich App 717, 719 (1993). The court may conduct an in-camera hearing prior to trial to determine the admissibility of the proposed evidence. In addition, if new information is discovered during trial that may make the proposed evidence admissible, the court may conduct an in-camera hearing during trial. MCL 750.520j(2).

If the defendant proposes to offer evidence of the victim's past sexual conduct with third persons, the court must determine whether admission of the evidence is necessary to preserve the defendant's constitutional right of confrontation. The procedure to be followed in determining admissibility of this evidence was set forth in *People v Hackett,* 421 Mich 338, 350–51 (1984):

> "The defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted. Unless there is a sufficient showing of relevancy in the defendant's offer of proof, the trial court will deny the motion. If there is a sufficient offer of proof as to a defendant's constitutional right to confrontation, as

> distinct simply from use of sexual conduct as evidence of character or for impeachment, the trial court shall order an *in camera* evidentiary hearing to determine the admissibility of such evidence in light of the constitutional inquiry previously stated. At this hearing, the trial court has, as always, the responsibility to restrict the scope of cross-examination to prevent questions which would harass, annoy, or humiliate sexual assault victims and to guard against mere fishing expeditions. . . . We again emphasize that in ruling on the admissibility of the proffered evidence, the trial court should rule against the admission of evidence of a complainant's prior sexual conduct with third persons unless that ruling would unduly infringe on the defendant's constitutional right to confrontation." [Citations omitted.]

Discussion

Michigan Rule of Evidence 404(a)(3) severely limits the admission of evidence concerning the reputation or past sexual conduct of an alleged criminal sexual conduct victim. This rule limits admission to "evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease" in a criminal sexual conduct case. The "rape shield statute," MCL 750.520j, adds that such evidence is admissible "only to the extent that the . . . proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value." MCL 750.520j(1).

> **Note:** The "rape shield statute" requires exclusion of the proffered evidence when its probative value is outweighed by its prejudicial effect. On the other hand, MRE 403 requires exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." It is unclear which standard applies. Compare *People v Adair,* 452 Mich 473, 481 (1996) (the "rape shield statute" modifies the standard in MRE 403 in criminal sexual conduct cases), and *Hackett, supra* at 361–62 (Kavanagh, J, concurring) (MRE 404(a)(3) supersedes MCL 750.520j(1), and MRE 403 must be applied.) For a general discussion of the relationship between the "rape shield statute" and MRE 404(a)(3), see *McDougall v Schanz,* 461 Mich 15, 44–46 (1999) (Cavanagh, J, dissenting).

However, if the proffered evidence is relevant, cross-examination of the victim regarding past sexual history may be required to preserve the defendant's right to confrontation. In *Hackett, supra* at 348, the Michigan Supreme Court provided examples of circumstances in addition to those

contained in MRE 404(a)(3) in which evidence of the victim's reputation or past sexual conduct may be admissible:

> "We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. . . . Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. . . . Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past." [Citations omitted.]

1. Cases Deciding What Constitutes "Sexual Conduct" With Persons Other Than the Defendant

A victim's statements to third persons may be "sexual conduct" if they amount to or reference specific actions. *People v Ivers,* 459 Mich 320, 329 (1998). The defendant's viewing of public sexual conduct between the victim and others is not sexual conduct between the victim and defendant. *People v Wilhelm (On Rehearing),* 190 Mich App 574, 584–85 (1991).

2. The Admissibility of Sexual Conduct With the Defendant That Occurred After the Charged Conduct

Consensual conduct between the defendant and the complainant that occurred after the alleged criminal conduct may be admissible at trial. *Adair, supra* at 483. In balancing the probative value and prejudicial nature of the evidence, the trial court should consider the time that elapsed between the charged and the subsequent conduct, whether a personal relationship existed between the defendant and the complainant, and "other human emotions intertwined with the relationship" that may have led to the subsequent conduct. *Id.* at 486–87. Compare *People v Stull,* 127 Mich App 14, 16–18 (1983) (evidence that the complainant had sexual intercourse with a third party seven hours after the alleged assault was inadmissible).

3. The Admissibility of Evidence Explaining the Victim's Physical Condition

If the prosecutor introduces evidence that the victim does not have an intact hymen to prove that the alleged penetration occurred, the defendant may be allowed to present evidence of the victim's prior sexual activity to show an alternative explanation for the victim's physical condition. *People v Mikula,* 84 Mich App 108, 113–15 (1978) (construing MCL 750.520j(1)(b), which allows admission of evidence of sexual activity showing "the source or origin of semen, pregnancy, or disease"), and *People v Haley,* 153 Mich App 400,

405 (1986). See also *People v Garvie,* 148 Mich App 444, 449 (1986) (the rule established in *Mikula* may be extended to the prior sexual abuse of a child explaining a change in the child's disposition).

Evidence of the victim's virginity is inadmissible under MRE 404(a)(3) to demonstrate that, because of her or his sexual inexperience, the victim was less likely to have consented to the alleged criminal sexual conduct. *People v Bone,* 230 Mich App 699, 702 (1998).

4. Cases Addressing the Defendant's Rights to Confrontation and to Present a Defense

In cases involving child victims of criminal sexual conduct, evidence of prior sexual conduct with a third person may be admissible to show the child's age-inappropriate sexual knowledge or motive to make false charges. *People v Morse,* 231 Mich App 424, 436 (1998). To obtain an in-camera hearing, the defendant must make an offer of proof of the relevance of the proffered evidence. *Id.* at 437, citing *People v Byrne,* 199 Mich App 674, 678 (1993). At an in-camera hearing, the court must determine whether "(1) defendant's proffered evidence is relevant, (2) defendant can show that another person was convicted of criminal sexual conduct involving the complainants, and (3) the facts underlying the previous conviction are significantly similar to be relevant to the instant proceeding." *Morse, supra* at 437. In addition, if the evidence is deemed admissible, the trial court may consider alternate means of admitting the evidence, such as eliciting testimony from another witness, introducing documents from the previous conviction, or by stipulation. *Id.* at 438. See also *Haley, supra* at 403 (where defendant was allowed to show the jury pornographic movies viewed by the child complainant and depicting the charged acts, defendant's right to present a defense was preserved).

Evidence of prior false accusations of improper sexual conduct made by the victim may be admissible. *People v Makela,* 147 Mich App 674, 685 (1985), and *People v Williams,* 191 Mich App 269, 271–74 (1991) (defendant failed to offer sufficient evidence of prior false accusation to obtain an evidentiary hearing).

Where defendant alleges that the victim is a prostitute, consented to the alleged conduct in exchange for money, and alleged a sexual assault when defendant refused to pay, evidence of the victim's reputation or past sexual conduct may be admissible. *People v Slovinski,* 166 Mich App 158, 178–80 (1988) (evidence of the victim's status as a prostitute was probative of the issue of consent, its probative value outweighed the danger of unfair prejudice, and exclusion of the evidence would violate the defendant's procedural due process rights by precluding the defendant's only defense), and *People v Powell,* 201 Mich App 516, 520 (1993) (victim's alleged employment as a topless dancer and alleged association with known prostitutes were not probative of the issue of whether she was a prostitute).

6.36 Motion to Suppress Evidence Seized Pursuant to a Defective Search Warrant

Moving Party: Defendant

Burden of Proof: Where the defendant seeks to suppress evidence seized pursuant to a search warrant,* the defendant has the burden of proving the illegality of the search or seizure. See *People v Ward,* 107 Mich App 38, 52 (1981), citing *Franks v Delaware,* 438 US 154, 171 (1978), and *People v Williams,* 134 Mich App 639, 643 (1984) (defendant must show by a preponderance of the evidence that affiant knowingly and intentionally or with reckless disregard for the truth inserted false material in the affidavit supporting the search warrant to have such information excluded from the affidavit). The defendant also has the burden of establishing his or her standing to challenge the search. *People v Zahn,* 234 Mich App 438, 446 (1999), and *People v Lombardo,* 216 Mich App 500, 505 (1996).

*Required procedures and standards for issuing search warrants are discussed in Smith, Criminal Procedure Monograph 2, *Issuance of Search Warrants—Third Edition* (MJI, 2006).

Discussion

The Fourth Amendment to the United States Constitution states:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Michigan's constitutional provision, Const 1963, art 1, §11, is substantially similar to the federal provision, except for the provision prohibiting suppression of guns, narcotics, and explosives following a violation of the state constitution. Absent compelling reasons, the Michigan constitution affords the same protection against unreasonable searches and seizures as does the federal constitution. *People v Nash,* 418 Mich 196, 214 (1983).

To establish his or her standing to challenge a search or seizure, a defendant must show that he or she had an expectation of privacy in the objects or premises searched, and that the expectation of privacy is one that society recognizes as reasonable. *People v Smith,* 420 Mich 1, 28 (1984). The trial court must examine the totality of the circumstances surrounding the search or seizure when making this determination. *Id.* Compare *Minnesota v Olson,* 495 US 91, 93–94, 100 (1990) (overnight guest had standing to challenge nonconsensual warrantless search of residence), and *People v Parker,* 230 Mich App 337, 339–41 (1998) (visitor to apartment searched pursuant to warrant did not have standing to challenge search and seizure). For discussion of the factors to consider in cases involving searches of business offices, see *People v Powell,* 235 Mich App 557 (1999).

Where the defendant challenges the truthfulness of factual statements made in the affidavit supporting a search warrant, the defendant must make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit . . . ." *Franks, supra,* 438 US at 155–56. If probable cause to support the search warrant does not exist without the allegedly false statement, the court must conduct a hearing upon the defendant's request; no hearing is required if, without the allegedly false statement, the warrant affidavit supports a finding of probable cause. *Id.* 438 US at 156, 171–72. The Court in *Franks* set forth in detail the procedure to be followed to determine whether the defendant is entitled to an evidentiary hearing:

> "To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient." *Id.* 438 US at 171.

Franks dealt only with the impeachment of the affiant's statements, not of nongovernmental informants' statements. Where the defendant alleges that an informant who supplied the police with information which led to the issuance of the search warrant does not exist, the court is required to hold an evidentiary hearing utilizing the procedure set forth in *Franks*. *People v Poindexter,* 90 Mich App 599, 605, 609–10 (1979). However, because of the difficulty of proving the nonexistence of an informant, the trial court has wide discretion to conduct an evidentiary hearing where the defendant raises a legitimate question regarding the informant's existence. *Id.* at 609 n 4. Following an evidentiary hearing, if the judge determines that there is some doubt as to the affiant's credibility, the judge has discretion to require the state to produce the informant at a closed hearing. *Id.* at 610, and *People v Thomas,* 174 Mich App 411, 417–18 (1989) (notwithstanding the parties' stipulation to the contents of the proposed witnesses' testimony, where the credibility of the affiant concerning an informant's existence is the determining factor, a trial court abuses its discretion by resolving the issue of the credibility of the affiant and supporting witnesses solely on the basis of the court's prior experience with the affiant, especially where the court did not observe the witnesses testifying).

On the other hand, no evidentiary hearing is required where the defendant alleges that the affidavit in support of the search warrant does not establish

probable cause for the issuance of the warrant, as probable cause must appear from the contents of the affidavit. MCL 780.653 and *People v Sundling,* 153 Mich App 277, 286 (1986).

Where portions of a search warrant are invalid because too general or unsupported by probable cause, a reviewing court may sever the invalid portions and determine whether the remaining facts establish probable cause for a search of the place or persons named. *People v Kolniak,* 175 Mich App 16, 22 (1989). Similarly, if an affidavit is based partially on unlawfully obtained information and partially on information obtained from an independent source, a reviewing court may sever the unlawfully obtained information and determine whether the information obtained from an independent source establishes probable cause. *People v Melotik,* 221 Mich App 190, 200–02 (1997).

"[A] search warrant and the underlying affidavit are to be read in a common-sense and realistic manner. Affording deference to the magistrate's decision simply requires that reviewing courts ensure that there is a substantial basis for the magistrate's conclusion that there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *People v Russo,* 439 Mich 584, 604 (1992), quoting *Illinois v Gates,* 462 US 213, 238 (1983).

In *People v Hawkins*, 468 Mich 488, 500 (2003), the defendant moved to suppress evidence obtained pursuant to a search warrant based on an affidavit that failed to satisfy the statutory requirements of MCL 780.653(b) for an affiant's reliance on unnamed sources. In deciding that the exclusionary rule did not apply to the evidence obtained in *Hawkins*, the Court overruled in part its previous ruling in *People v Sloan*, 450 Mich 160 (1995), the case on which the Court of Appeals relied in its disposition of the case. In *Sloan*, the "Court held that evidence obtained under a search warrant issued in violation of §653 must be suppressed," and the Court of Appeals affirmed the trial court's order suppressing the proceeds of the search warrant. *Hawkins, supra* at 493. The *Hawkins* Court disagreed with the earlier *Sloan* analysis and held:

> "[W]here there is no determination that a statutory violation constitutes an error of constitutional dimensions, application of the exclusionary rule is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied." *Hawkins, supra* at 507.

The Court predicted that some statutory violations would be of constitutional magnitude, and the exclusionary rule would likely be appropriate to suppress any evidence obtained from warrants issued on inadequate affidavits. However, the Court concluded that

> "[n]othing in the plain language of §653 provides us with a sound basis for concluding that the Legislature intended that noncompliance with its affidavit requirements, standing alone, justifies application of the exclusionary

> rule to evidence obtained by police in reliance of a search warrant." *Hawkins, supra* at 510.

The Michigan Supreme Court adopted the "good-faith" exception to the exclusionary rule in *People v Goldston*, 470 Mich 523, 526 (2004). The "good-faith" exception was first announced by the United States Supreme Court in *United States v Leon*, 468 US 897 (1984), as a remedy for automatic exclusion of evidence obtained from a law enforcement officer's reasonable, good-faith reliance on a search warrant later found to be defective. According to the *Goldston* Court:

> "The purpose of the exclusionary rule is to deter police misconduct. That purpose would not be furthered by excluding evidence that the police recovered in objective, good-faith reliance on a search warrant." *Goldston, supra* at 526.

As adopted by the Michigan Supreme Court in *Goldston*, "[t]he 'good faith' exception [to the exclusionary rule] renders evidence seized pursuant to an invalid search warrant admissible as substantive evidence in criminal proceedings where the police acted in reasonable reliance on a presumptively valid search warrant that was later declared invalid [internal citation omitted]." *People v Hellstrom*, 264 Mich App 187, 193 (2004). Without deciding whether the search warrant in *Hellstrom* was valid, the Court of Appeals applied the good-faith exception to evidence seized by police officers pursuant to a warrant based on a magistrate's probable cause determination. *Hellstrom, supra* at 199–201.

The good-faith exception to the exclusionary rule does not apply to evidence obtained pursuant to a search warrant based on an affiant's admitted and purposeful false statements. *People v McGee*, ___ Mich App ___, ___ (2005).

In *McGee*, the defendant argued that evidence obtained in 1992 through the execution of an illegal search warrant should not be admissible against him in a 1998 criminal proceeding. *McGee, supra* at ___. Citing *Elkins v United States*, 364 US 206 (1960), and *United States v Janis*, 428 US 433 (1976), the *McGee* Court agreed:

> "Although much of the cited text is dicta with respect to the instant issue, it indicates that evidence obtained by a law enforcement officer with respect to any criminal proceeding falls within the officer's zone of primary interest. It also appears to suggest that the 1992 evidence should have been excluded. . . . Here, because the evidentiary hearing with respect to the 1992 search indicated that the officer who swore to the affidavit for the warrant provided false statements, the violation was substantial and deliberate, and [the evidence] should have

been suppressed." *McGee, supra* at ___ (footnote and citations omitted).

6.37 Motion to Suppress Evidence Seized Without a Search Warrant

Moving Party: Defendant*

*For a more complete discussion, see Johnson, *Michigan Circuit Court Benchbook* (MJI, 2004), Sections 4.21–4.24.

Burden of Proof: Where the defendant seeks to suppress evidence seized pursuant to a warrantless search and seizure, the burden of proof is on the prosecution to show that the search and seizure were reasonable and fell under a recognized exception to the warrant requirement. *People v White,* 392 Mich 404, 410 (1974). Because warrantless searches are per se unreasonable and violate US Const, Am IV, and Const 1963, art 1, §11, the burden is on the party who seeks exemption from the constitutional mandate to show that the exigencies of the situation made the warrant requirement unreasonable. *People v Reed,* 393 Mich 342, 362 (1975), and *People v Mason,* 22 Mich App 595, 617–18 (1970). See also *White, supra* at 420–21:

> "The judicial preference for searches conducted under the authority of a search warrant should be expressed not only in terms of the narrowly drawn exceptions to the warrant requirement but also in terms of a more stringent standard of review applied to all aspects of warrantless searches. The courts thereby encourage police officers to seek a warrant before acting."

*For further discussion of consent, see Smith, Criminal Procedure Monograph 2, *Issuance of Search Warrants—Third Edition* (MJI, 2006), Section 2.14(F).

Where the prosecution relies on consent* to justify a warrantless search and seizure, it has the burden to prove that the consent was unequivocal and specific, and freely and intelligently given. *People v Kaigler,* 368 Mich 281, 294 (1962). See also *People v Dinsmore,* 103 Mich App 660, 672 (1981) (prosecutor has the burden of establishing the voluntariness of the consent by "direct and positive evidence"), and *United States v Matlock,* 415 US 164, 177 (1974) (prosecutor must show the voluntariness of consent by a preponderance of the evidence). Because a consent to search involves the waiver of a constitutional right, the prosecutor cannot discharge this burden by showing a mere acquiescence to a claim of lawful authority. *Bumper v North Carolina,* 391 US 543, 548–49 (1968). Where the defendant is under arrest at the time of the alleged consent, the prosecutor's burden is "particularly heavy." *Kaigler, supra* at 294.

The defendant has the burden of establishing his or her standing to challenge the search or seizure. *People v Zahn,* 234 Mich App 438, 446 (1999), and *People v Lombardo,* 216 Mich App 500, 505 (1996).

Discussion

The Fourth Amendment to the United States Constitution states:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Michigan's constitutional provision, Const 1963, art 1, §11, is substantially similar to the federal provision, except for the provision prohibiting suppression of guns, narcotics, and explosives following a violation of the state constitution. Absent compelling reasons, the Michigan constitution affords the same protection against unreasonable searches and seizures as does the federal constitution. *People v Nash,* 418 Mich 196, 214 (1983).

To establish his or her standing to challenge a search or seizure, a defendant must show that he or she had an expectation of privacy in the objects or premises searched, and that the expectation of privacy is one that society recognizes as reasonable. *People v Smith,* 420 Mich 1, 28 (1984), *People v Custer (On Remand),* 248 Mich App 552, 561–62 (2002) (police officer's looking through front window of house with flashlight did not violate defendant's reasonable expectation of privacy), and *People v Tierney,* 266 Mich App 687, 694–704 (2005) (defendant did not have reasonable expectation of privacy in the enclosed porch of his parents' home). The trial court must examine the totality of the circumstances surrounding the search or seizure when making this determination. *Id.* Compare *Minnesota v Olson,* 495 US 91, 93–94, 100 (1990) (overnight guest had standing to challenge nonconsensual warrantless search or residence), and *People v Parker,* 230 Mich App 337, 339–41 (1998) (visitor to apartment searched pursuant to warrant did not have standing to challenge search and seizure). For discussion of the factors to consider in cases involving searches of business offices, see *People v Powell,* 235 Mich App 557 (1999).

Under Michigan law, a trespasser has no legitimate expectation of privacy in a dwelling house even when the trespasser lawfully occupied the premises at an earlier date. *United States v Hunyady*, 409 F3d 297, 302–03 (CA 6, 2005).

The court must conduct an evidentiary hearing if the defendant challenges the legality of a warrantless search and seizure and factual issues are in dispute. *People v Wiejecha,* 14 Mich App 486, 488 (1968), citing *Jackson v Denno,* 378 US 368 (1964), *People v Reynolds,* 93 Mich App 516, 519 (1979), and *People v Johnson,* 202 Mich App 281, 285–87 (1993). See also *People v Ramos,* 17 Mich App 515, 519 (1969) (trial judge's refusal to hear testimony in support of a motion to suppress evidence in a bench trial was not error, where the judge concluded that no favorable testimony would have been forthcoming). If the defendant testifies at the hearing, taking the stand is not a general waiver of the right not to testify at trial. *Wiejecha, supra* at 489, and MRE 104(d).

Defense counsel may agree to have the motion to suppress evidence decided on the basis of a preliminary examination transcript. *People v Kaufman,* 457 Mich 266, 276 (1998), overruling in part *People v Talley,* 410 Mich 378, 390 (1981). See also MCR 6.110(D) (a party may move to suppress evidence in the trial court on the basis of a prior evidentiary hearing). In addition, the trial court may decide the motion based on a stipulation of facts sufficiently complete to determine the constitutional issue in question, including facts appearing in the preliminary examination transcript. *People v Futrell,* 125 Mich App 568, 571 (1983).

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v United States,* 389 US 347, 357 (1967). The following discussion includes only the major cases dealing with three commonly used exceptions to the warrant requirement.

1. Searches of Automobiles for Evidence

Because of their mobility, warrantless searches of automobiles based on probable cause may be justified by fewer foundational facts than required to justify the search of a residence or office. *Chambers v Maroney,* 399 US 42, 50 (1970), *Texas v White,* 423 US 67 (1975), and *People v Garvin,* 235 Mich App 90, 102 (1999) (lessened expectation of privacy in automobiles also justifies warrantless searches based on probable cause). Where the police have probable cause to search an automobile, they may conduct a warrantless search of the automobile immediately or later at the "station house." *Chambers, supra,* 399 US at 51–52.

Where police officers have probable cause to search an automobile, they may conduct a warrantless search of every part of the vehicle that may conceal the object of the search, including separate containers. *United States v Ross,* 456 US 798, 824–25 (1982), and *People v Sinistaj,* 184 Mich App 191, 199–200 (1990). See also *Wyoming v Houghton,* 526 US 295, 307 (1999) (officers may search a passenger's belongings if they have probable cause to search the entire automobile). Where they have probable cause to believe a container within an automobile contains evidence or contraband, officers may search the container without a warrant even though they do not have probable cause to search the entire vehicle. *California v Acevedo,* 500 US 565, 579–80 (1991).

Probable cause to search an automobile may be premised on an officer's recognition of the smell of burned or unburned marijuana. *People v Kazmierczak,* 461 Mich 411, 420–24 (2000).

Brief investigative stops short of arrest are permitted where police have a reasonable suspicion of ongoing criminal activity. The criteria for a constitutionally valid investigative stop are that the police have "a particularized suspicion, based on an objective observation, that the person

stopped has been, is, or is about to be engaged in criminal wrongdoing." *People v Peebles*, 216 Mich App 661, 665 (1996), citing *People v Shabaz*, 424 Mich 42, 59 (1985). "Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *People v Champion,* 452 Mich 92, 98 (1996). A totality of the circumstances test is used in cases involving investigative stops. *United States v Arvisu,* 534 US 266, 273–76 (2002), *People v Christie* (*On Remand*), 206 Mich App 304, 308 (1994), citing *Terry v Ohio*, 392 US 1 (1968), and *People v Faucett*, 442 Mich 153, 168 (1993).

In *People v Whalen*, 390 Mich 672, 682 (1973), the Michigan Supreme Court articulated the following rules regarding the stopping, searching, and seizing of motor vehicles and their contents:

- Reasonableness is the test that is to be applied for both the stop and search of motor vehicles.
- Reasonableness will be determined from the facts and circumstances of each case.
- Fewer foundation facts are needed to support a finding of reasonableness when moving vehicles are involved than if a house or home were involved.
- An investigatory stop of a vehicle may be based upon fewer facts than needed to support a finding of reasonableness where both a stop and a search are conducted by police.

Police may properly stop a vehicle for an observed defective equipment violation. *People v Rizzo,* 243 Mich App 151, 156 (2000).

Although a police officer needs no probable cause or articulable suspicion to conduct a computer check of a vehicle's license plate number, an investigatory stop of any vehicle is valid only if the stop is predicated on an officer's articulable and reasonable suspicion that an occupant of the vehicle has violated the law. *People v Jones*, 260 Mich App 424, 427–29 (2004). If a law enforcement officer has probable cause to believe a driver has violated a traffic law, he or she may stop the vehicle. *Whren v United States,* 517 US 806, 813 (1996), and *People v Davis,* 250 Mich App 357, 362–64 (2002).

Further detention of a motorist after a valid traffic stop is permissible if a police officer has a reasonable, articulable suspicion that the motorist was involved or was about to be involved in criminal activity. *Champion, supra* at 98, *Shabaz, supra* at 54, and *People v Lewis,* 251 Mich App 58, 70–71 (2002). To determine whether an investigatory detention was reasonable, a court must examine the totality of the circumstances as understood by law enforcement officers. A suspect's behavior need only be "evasive" or "nervous" to support a reasonable suspicion. *Illinois v Wardlaw,* 528 US 119, 124 (2000), *People v Oliver,* 464 Mich 184, 192–97 (2001), and *Lewis, supra* at 70–73.

Following a proper investigative stop of an automobile, a law enforcement officer is "permitted to briefly detain the vehicle and make reasonable inquiries aimed at confirming his [or her] suspicions." *People v Yeoman,* 218 Mich App 406, 411 (1996), citing *People v Nelson,* 443 Mich 626, 637 (1993). A police officer may order the driver and passengers out of a vehicle during a valid traffic stop. *Pennsylvania v Mimms,* 434 US 106, 109–11 (1977), and *Maryland v Wilson,* 519 US 408, 415 (1997).

In *Illinois v Caballes*, 543 US 405 (2005), a police officer lawfully stopped the defendant for a traffic violation. Another officer—one accompanied by a narcotic-sniffing dog—heard the police dispatch about the traffic stop and joined the defendant and the first officer at the scene. As the first officer completed his duties with regard to the traffic stop, the second officer walked the drug-sniffing dog around the exterior of the defendant's vehicle, and the dog alerted to the trunk of the defendant's car. A search of the defendant's trunk revealed a quantity of marijuana for which the defendant was charged and convicted. The defendant claimed that the marijuana was inadmissible against him because he was detained beyond the time necessary to process the initial traffic stop, and because no reasonable suspicion existed to support the search of his vehicle. *Caballes, supra,* 543 US at ___.

Citing to *United States v Jacobsen*, 466 US 109 (1984), the *Caballes* Court explained that when police conduct does not affect a defendant's legitimate interest in privacy, the conduct cannot be characterized as a search and therefore, the conduct does not demand fourth amendment analysis. *Caballes, supra* at ___. The Court reiterated its reasoning in *Jacobsen*: a defendant can have no legitimate interest in possessing contraband. Thus, where police conduct reveals *only* the defendant's possession of contraband, no legitimate interest in privacy was implicated. *Caballes, supra,* 543 US at ___, citing *Jacobsen, supra,* 466 US at 123.

In the *Caballes* Court's opinion:

> "[C]onducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy." *Caballes, supra,* 543 US at ___.

Relying on the decision reached in *United States v Place*, 462 US 696 (1983), the *Caballes* Court further concluded:

> "[T]he dog sniff was performed on the exterior of a respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement." *Caballes, supra,* 543 US at ___.

2. Searches Incident to Valid Arrest

Contemporaneous with the lawful custodial arrest of a person, police officers may conduct a warrantless full search of that person. *United States v Robinson,* 414 US 218, 235 (1973). Such a search may extend to the immediately surrounding area, "the area from within which [the person arrested] might gain possession of a weapon or destructible evidence." *Chimel v California,* 395 US 752, 763 (1969). Police may also lawfully search the passenger compartment of an automobile and any open or closed containers found in the passenger compartment incident to the lawful arrest of an occupant of the automobile. *New York v Belton,* 453 US 454, 460–61 (1981), *People v Davis,* 250 Mich App 357, 364–65 (2002) (after LEIN check, defendant was arrested on outstanding warrants, and subsequent search of vehicle incident to arrest was proper), and *People v Fernengel,* 216 Mich App 420 (1996) (where the defendant was arrested 20 to 25 feet from his automobile after voluntarily exiting it, neither *Chimel* nor *Belton* allowed the warrantless search of the automobile).

A police officer may lawfully search an individual's vehicle incident to that individual's arrest, even when the officer's first contact with the arrestee occurs after the individual has gotten out of the vehicle. *Thornton v United States*, 541 US 615, ___ (2004). In *Thornton*, the defendant contested the admissibility of evidence obtained from the officer's search of his car when the officer who arrested the defendant did not address him until he was already out of, and away from, his vehicle. The United States Supreme Court disagreed with the defendant's argument that a search incident to arrest under *Belton* "was limited to situations where the officer initiated contact with an arrestee while he was still an occupant of the car." *Thornton, supra,* 541 US at ___. According to the Court:

> "In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle. An officer may search a suspect's vehicle under *Belton* only if the suspect is arrested. . . . . The stress [and the risk of danger to the police officer] is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle. In either case, the officer faces a highly volatile situation. It would make little sense to apply two different rules to what is, at bottom, the same situation [internal citations omitted]." *Thornton, supra,* 541 US at ___.

The Court further reasoned:

> "*Belton* allows police to search the passenger compartment of a vehicle incident to a lawful custodial arrest of both

> 'occupants' and 'recent occupants.' Indeed, the respondent in *Belton* was not inside the car at the time of the arrest and search; he was standing on the highway. In any event, while an arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him [internal citations and footnote omitted]." *Thornton, supra,* 541 US at ___.

Incident to a lawful arrest and without probable cause or reasonable suspicion, officers may "look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Maryland v Buie,* 494 US 325, 334 (1990). A "protective sweep" of an arrest scene is permissible if the officer possesses a reasonable belief based on specific and articulable facts that, together with rational inferences from those facts, reasonably warrant the officer in believing that the area swept contained an individual posing a danger to the officer or others. *Id.* at 327, quoting *Michigan v Long,* 463 US 1032, 1049–50 (1983) (limited "frisk" of automobile passenger compartment for weapons permissible in conjunction with investigative stop), and *Terry v Ohio,* 392 US 1, 21 (1968) (limited "frisk" of individual permissible in conjunction with investigative stop). "A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Buie, supra,* 494 US at 327.

A consensual encounter between an officer and a private citizen does not implicate the citizen's constitutional right to be free from unreasonable searches and seizures. An initially consensual encounter may become a seizure when, based on the information obtained and observations made, an officer develops reasonable suspicion that the citizen has been involved in criminal activity. *People v Jenkins*, 472 Mich 26, 32–35 (2005). In addition, an investigatory stop may lead to an arrest based on other information gained and observations made. Evidence discovered as a result of a lawful arrest is properly seized at the time of the arrest. *Jenkins, supra*.

Evidence was properly seized and admitted at trial against the defendant when it was discovered during a police officer's lawful investigatory detention of the defendant. *People v Dunbar*, 264 Mich App 240, 245–50 (2004).

3. Seizure of Items in Plain View

If police officers are lawfully in a position to view an object, the object's incriminating character is immediately apparent, and the officers have a lawful right of access to the object, they may seize it without obtaining a warrant. *Horton v California,* 496 US 128, 136–37 (1990), and *People v Moore (On Remand),* 186 Mich App 551 (1990) (seizure of items in plain

view is permissible regardless of whether police had a prior reason to suspect the items would be found). See also *Long, supra,* 463 US at 1050 ("plain view" doctrine used to uphold seizure of marijuana from passenger compartment of automobile during limited search for weapons). However, if police lack probable cause to believe that the object is contraband without conducting a further search of the object, it may not be seized without a warrant pursuant to the "plain view" doctrine. *Arizona v Hicks,* 480 US 321, 326 (1987). In *People v Custer,* 465 Mich 319, 336–38 (2001) (Markman, J), the Court stated that "the exterior of an item [here, photographs] that is validly seized during a patdown search may be examined without a search warrant . . . ."

The plain view doctrine may justify an officer's seizure of items not specifically enumerated in a search warrant if the incriminating nature of the items seized was immediately apparent to the officer, and the officer was lawfully in the position from which the items were seen. *People v Fletcher*, 260 Mich App 531, 550–51 (2004).

Marijuana plants growing in a shed behind the defendant's house were inadmissible at trial because although the marijuana plants were in plain view from the police officer's vantage point in the defendant's backyard, the officer's entry into the defendant's backyard was unlawful. *People v Galloway*, 259 Mich App 634, 639–42 (2003). In *Galloway*, the prosecution contended that the police officers—via their initiation of a "knock and talk" procedure—were lawfully in the defendant's backyard when they saw the marijuana plants in the defendant's shed. The Court of Appeals, first noting that the ordinary rules governing police conduct apply to circumstances surrounding a "knock and talk," explained the proper execution of the "knock and talk" procedure:

**Frohriep* upheld the constitutionality of the "knock and talk" procedure. *Frohriep, supra* at 698.

> "'Generally, the knock and talk procedure is a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in the illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items.'" *Galloway*, *supra* at 639, quoting *People v Frohriep*, 247 Mich App 692, 697 (2001).*

The Court further stated that the police officers' claim that they were lawfully in the defendant's backyard by virtue of their "knock and talk" approach constituted a misuse of the tactic:

> "[T]he knock and talk visit can[not] be used as the premise for a warrantless entry of the backyard area of [a] defendant's home [and the warrantless entry cannot then]

> justify the seizure of evidence under the plain view exception to the search and seizure warrant requirement." *Galloway*, *supra* at 636.

In *Terry, supra,* 392 US at 24, the United States Supreme Court held that an officer may conduct a limited patdown search for weapons during an investigative encounter. "If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context." *Minnesota v Dickerson,* 508 US 366, 375–76 (1993). See also *Champion, supra* at 105 (adopting *Dickerson*'s "plain feel" exception to the warrant requirement and stating that the officer must develop probable cause to believe the item is contraband before going beyond the scope of a patdown search).

6.38 Motion for Separate Trials of Multiple Defendants

Moving Party: Defendant or prosecutor

Burden of Proof: A defendant has a right to severance of unrelated offenses. MCR 6.121(B). When related offenses alleged against two or more defendants are joined for trial, a defendant who seeks severance bears the burden of clearly, affirmatively, and fully showing that joint trial will prejudice his or her substantial rights. *People v Hana*, 447 Mich 325, 346–47 (1994), and MCR 6.121(C). A defendant may also seek severance of related offenses on the basis that severance is necessary to promote fairness to the parties and a fair determination of guilt or innocence. MCR 6.121(D). If the prosecutor seeks severance of the trial of multiple defendants charged with related offenses, he or she must show that severance is necessary to promote fairness to the parties and a fair determination of guilt or innocence. *Id*.

Discussion

MCL 768.5 provides:

> "When two (2) or more defendants shall be jointly indicted for any criminal offense, they shall be tried separately or jointly, in the discretion of the court."

MCR 6.121 provides:

> **"(A) Permissive Joinder.** An information or indictment may charge two or more defendants with the same offense. It may charge two or more defendants with two or more offenses when

> (1) each defendant is charged with accountability for each offense, or
>
> (2) the offenses are related as defined in MCR 6.120(B).
>
> When more than one offense is alleged, each offense must be stated in a separate count. Two or more informations or indictments against different defendants may be consolidated for a single trial whenever the defendants could be charged in the same information or indictment under this rule.
>
> **(B) Right of Severance; Unrelated Offenses.** On a defendant's motion, the court must sever offenses that are not related as defined in MCR 6.120(B).
>
> **(C) Right of Severance; Related Offenses.** On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.
>
> **(D) Discretionary Severance.** On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potentialfor confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties' readiness for trial."

*Effective January 1, 2006.

MCR 6.120(B)(1)* defines related offenses as those that are based on

> "(a) the same conduct or transaction, or
>
> "(b) a series of connected acts, or
>
> "(c) a series of acts constituting parts of a single scheme or plan."

In Michigan, there is a strong public policy favoring joint trials. *People v Carroll*, 396 Mich 408, 414 (1976). The decision to sever or join defendants lies within the discretion of the trial court. Severance is mandated only if a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his or her substantial rights will be prejudiced absent severance. A defendant seeking severance must show that there is a serious risk that a joint trial would

compromise a specific trial right of the moving party or prevent the jury from making a reliable judgment as to guilt or innocence. The moving party must show that severance is necessary, i.e., that no other avenue of relief is available. *Hana, supra* at 345–47, 355, 359. See also *People v Schram*, 378 Mich 145, 156 (1966), and *Carroll*, *supra.* Examples of prejudice resulting from joinder include the admission of evidence against one defendant that is inadmissible against another defendant or the exclusion of evidence that is exculpatory as to one defendant because it is inadmissible in a joint trial. *Hana*, *supra* at 346 n 7.

Inconsistency or antagonism of defenses is not alone sufficient to mandate severance. Severance is required if the defenses of separate defendants are mutually exclusive or irreconcilable. Defenses are mutually exclusive if a jury, in order to believe the core of evidence offered on behalf of one defendant, must disbelieve the core of evidence offered by another defendant. The tension between the defenses must be so great that the jury would have to believe one defendant at the expense of another defendant. *Id*. at 349–50.

The risk of prejudice from a joint trial may be allayed by proper jury instructions and by the use of dual juries. Dual juries, a partial form of severance, may be used if the procedure does not prejudice the substantial rights of a defendant. *Id*. at 351–52, 359, 362.

6.39 Motion for Severance or Joinder of Multiple Charges Against a Single Defendant

Moving Party: Defendant or prosecutor

Burden of Proof: A defendant is entitled to severance of joined charges if he or she shows that the charges are not related. MCR 6.120(C). A court may join offenses charged in two or more informations or indictments or sever offenses charged in a single information or indictment when it is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense. MCR 6.120(B).

Discussion

MCR 6.120* provides:

*Effective January 1, 2006.

> **"(A) Charging Joinder.** The prosecuting attorney may file an information or indictment that charges a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial.
>
> **"(B) Postcharging Permissive Joinder or Severance.** On its own initiative, the motion of a party, or the stipulation

> of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
>
> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.
>
> (2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.
>
> (3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.
>
> **"(C) Right of Severance; Unrelated Offenses.** On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1)."

*See Section 6.40, below, for discussion of MRE 404(b).

Joinder of related and unrelated charges against a single defendant is permitted. MCR 6.120(A). Upon proper motion, however, a defendant has an unqualified right to severance of unrelated charges. *People v Daughenbaugh*, 193 Mich App 506, 508–10 (1992), modified in part on another ground 441 Mich 867 (1992) and MCR 6.120(C). Severance of unrelated charges upon defense motion is required notwithstanding the possibility that evidence of unrelated offenses may be admissible at separate trials pursuant to MRE 404(b).* *Daughenbaugh*, *supra* at 510–11. Joinder and severance of related charges, joinder of unrelated charges, and severance of unrelated charges to whose joinder the defendant has not objected, are discretionary with the trial court. MCR 6.120(B). See *People v Duranseau*, 221 Mich App 204, 208 (1997).

Related offenses, of which a defendant does not have an absolute right to severance, include offenses that are part of a common scheme or plan. MCR 6.120(B)(1)(c). Criminal offenses are related as part of a common plan where the objective of each offense was to contribute to the achievement of a goal

not attainable by the commission of any of the individual offenses, based on the theory of the prosecution or the defense. *People v McCune*, 125 Mich App 100, 103–04 (1983).

See also *People v Girard*, ___ Mich App ___, ___ (2005), where the trial court properly denied the defendant's request to sever the CSC-I charges from the charges of possession of child sexually abusive material. In *Girard*, the evidence showed that the conduct underlying the charges against the defendant was plainly accounted for by the language of MCR 6.120(B)—"offenses are related if they are based on the same conduct or a series of connected acts or acts constituting part of a single scheme or plan." Testimony at the defendant's trial established "that defendant used child pornography for stimulation before and during his sexual abuse of the complainant and thus was part of his modus operandi." *Girard, supra* at ___.

It is permissible to join related felony and misdemeanor charges in circuit court. MCL 767.1 and *People v Loukas*, 104 Mich App 204, 207–08 (1981).

6.40 Motion in Limine—Evidence of Other Crimes, Wrongs, or Acts

Moving Party: Prosecutor*

*For a more complete discussion, see Smith, *Sexual Assault Benchbook* (MJI, 2002), Section 7.3.

Burden of Proof: The prosecutor must provide reasonable notice of the general nature of the evidence of other crimes, wrongs, or acts that he or she intends to introduce at trial, and the rationale for admitting the evidence. Notice must be given in advance of trial, or during trial if the prosecutor shows good cause for failing to give pretrial notice. MRE 404(b)(2). The prosecutor bears the burden of establishing the relevance of the proffered evidence. *People v Crawford*, 458 Mich 376, 385–86 n 6 (1998).

Discussion

MCL 768.27 provides:

> "In any criminal case where the defendant's motive, intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or systemin doing an act is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing theact in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant."

*Effective January 1, 2006. See 2005 PA 135.

MCL 768.27a* states:

> "(1) Notwithstanding [MCL 768.]27, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.
>
> "(2) As used in this section:
>
> (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.
>
> (b) "Minor" means an individual less than 18 years of age."

MRE 404(b) provides:

> "(1) Evidence of other crimes, wrongs, or acts is not admissible toprove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.
>
> "(2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination."

Evidence is inadmissible under MRE 404(b) if the sole theory of relevance is that evidence of another act shows the defendant's inclination to wrongdoing

in general to prove that he or she committed the conduct in question. It is not permissible to infer the defendant's character from evidence of prior acts; nor is it permissible to infer that the defendant engaged in the charged conduct from evidence of his or her subjective character. *People v VanderVliet*, 444 Mich 52, 61–65 (1993).

To be admissible, evidence of other acts must be:

1) offered for a proper purpose under MRE 404(b), i.e., offered for a purpose other than propensity to commit wrongdoing;

2) relevant to an issue or fact of consequence at trial, MRE 402; and

3) of probative value which is not substantially outweighed by its prejudicial effect, MRE 403. *VanderVliet*, *supra* at 55 n 1, 74–75, *People v Starr*, 457 Mich 490, 496–98 (1998), and *Crawford*, *supra* at 388–90.

Upon request, the trial court may give a limiting jury instruction concerning the purposes for which the evidence of other acts may be considered. *VanderVliet*, *supra* at 75.

There is no rule limiting admissibility of evidence of other acts to the specific exceptions listed in MRE 404(b)(1). *VanderVliet, supra* at 65, *Starr*, *supra* at 496, and *Crawford*, *supra* at 390 n 8. A defendant's general denial of the charge does not render evidence of other acts inadmissible. *VanderVliet*, *supra* at 65, 75–78, 83, 89 n 49, and *Starr*, *supra* at 501.

If offered to prove the defendant's plan, scheme, or system, the uncharged act and the charged offense must be sufficiently similar to support an inference that they manifest a common plan, scheme, or system. If offered to prove the defendant's plan, scheme, or system, the uncharged and charged acts need not be part of a single continuing conception or plan, and the plan need not be unusual or distinctive. *People v Sabin (After Remand)*, 463 Mich 43, 63–66 (2000). Mere similarity between the uncharged and charged acts may be sufficient if the evidence is offered to prove intent. *Id*. at 64. If the evidence is offered to prove identity, the evidence must necessarily suggest employment of a unique, peculiar, or special style so distinctive as to justify a reasonable inference of a personalized *modus operandi* and to earmark both offenses as the handiwork of the same person. *People v Golochowicz*, 413 Mich 298, 310–12 (1982), and *Sabin*, *supra* at 65–66.

6.41 Motion to Dismiss—Denial of Right to Speedy Trial

Moving Party: Defendant

Burden of Proof: Where there has been a delay of at least six months after a defendant's arrest, further investigation into a claim of denial of the right to a

speedy trial is necessary. *People v Daniel*, 207 Mich App 47, 51 (1994). Where the delay following a defendant's arrest is less than 18 months, the defendant bears the burden of showing prejudice by reason of the delay. After a delay of 18 months, prejudice to the defendant is presumed and the burden shifts to the prosecutor to rebut the presumption. *People v Collins*, 388 Mich 680, 695 (1972), and *People v Cain*, 238 Mich App 95, 112 (1999).

Discussion

A defendant's right to a speedy trial is guaranteed by US Const, Am VI, Const 1963, art 1, § 20, and MCL 768.1. Factors to be balanced in determining whether a defendant's right to speedy trial has been violated are 1) the length of the delay, 2) the reasons for the delay, 3) whether the defendant has asserted his or her right to a speedy trial, and 4) whether the defendant has been prejudiced by the delay. *People v Grimmett*, 388 Mich 590, 606 (1972), overruled in part on other grounds 390 Mich 245 (1973), and *People v Collins*, 388 Mich 680, 682 (1972). If the delay following the defendant's arrest exceeds 18 months, prejudice is presumed and inquiry into the first three of these factors is required in balancing competing interests. *People v Wickham*, 200 Mich App 106, 109–10 (1993).

Delays occasioned by defense motions and adjournments requested by the defense are charged to the defendant in examining his or her speedy trial claim. *Cain*, *supra* at 113, and *People v Gilmore*, 222 Mich App 442, 461 (1997). Delays inherent in the court system, including those attributed to docket congestion, scheduling of pretrial conferences, and adjournments for motions, are attributed to the prosecutor but are assigned minimal weight. *Id*. at 460, and *Wickham*, *supra* at 111. The complexity of the case and the resultant burden of gathering and analyzing evidence may establish legitimate reason for the delay. *Cain*, *supra*.

Potential prejudice caused by delay after arrest includes both prejudice to the defendant's person by reason of oppressive pretrial incarceration, anxiety and concern, and prejudice to the defense. Impairment of the defense is the most serious concern. *Collins*, *supra* at 694. General allegations of prejudice to the defense are insufficient, as is a showing of anxiety alone. *Gilmore*, *supra* at 462. The causal connection between alleged prejudice and the delay must be shown. See *Wickham*, *supra* at 112.

"Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice." MCR 6.004(A).

6.42 Motion to Release on Personal Recognizance—Delayed Felony and Misdemeanor Cases

Moving Party: Defendant or prosecutor

Burden of Proof: The moving party has the burden of proof. The party opposing the motion has the burden to show good cause for delay. See MCR 6.004(C)(1)–(6). The prosecutor has the burden to show that a period of delay resulting from an adjournment requested by the prosecutor shall not be included in determining whether the defendant has been incarcerated for the requisite period. MCR 6.004(C)(4).

Discussion

MCR 6.004(C)* states as follows:

*Effective January 1, 2006.

> **"(C) Delay in Felony and Misdemeanor Cases; Recognizance Release.** In a felony case in which the defendant has been incarcerated for a period of 180 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, or in a misdemeanor case in which the defendant has been incarcerated for a period of 28 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, the defendant must be released on personal recognizance, unless the court finds by clear and convincing evidence that the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community. In computing the 28-day and 180-day periods, the court is to exclude
>
> > (1) periods of delay resulting from other proceedings concerning the defendant, including but not limited to competency and criminal responsibility proceedings, pretrial motions, interlocutory appeals, and the trial of other charges,
> >
> > (2) the period of delay during which the defendant is not competent to stand trial,
> >
> > (3) the period of delay resulting from an adjournment requested or consented to by the defendant's lawyer,
> >
> > (4) the period of delay resulting from an adjournment requested by the prosecutor, but only if the prosecutor demonstrates on the record either
> >
> > (a) the unavailability, despite the exercise of due diligence, of material evidence that the prosecutor has reasonable cause to believe will be available at a later date; or
> >
> > (b) exceptional circumstances justifying the need for more time to prepare the state's case,

> (5) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run, but only if good cause exists for not granting the defendant a severance so as to enable trial within the time limits applicable, and
>
> (6) any other periods of delay that in the court's judgment are justified by good cause, but not including delay caused by docket congestion."

If an accused has been incarcerated for the requisite period and no good cause for the delay is shown, a presumption arises that the accused should be released on personal recognizance. However, that presumption may be rebutted "by clear and convincing evidence that the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community." MCR 6.004(C). If the presumption is rebutted, see Const 1963, art 1, § 15, MCL 765.6, and MCR 6.106 for the applicable pretrial release considerations.

6.43 Motion to Dismiss—Violation of 180-Day Rule

Moving Party: Defendant

Burden of Proof: In order to invoke the 180-day rule, the defendant must show that he or she was an inmate of a Michigan correctional facility or in a local facility awaiting imprisonment in a state prison. See *People v Williams*, 66 Mich App 521, 524 (1976). Once it is shown that a defendant covered by the rule has not been brought to trial within the 180-day period described in MCL 780.131(1) and MCR 6.004(D), the prosecution bears the burden of establishing good faith in readying the case for trial during the 180-day period. See *People v Ferguson*, 94 Mich App 137, 143 (1979).

> **Note:** The requirement that the prosecuting attorney show a good-faith effort to ready the case for trial is based on the Michigan Supreme Court's interpretation of MCL 780.131 in *People v Hendershot,* 357 Mich 300, 304 (1959). That interpretation was incorporated into MCR 6.004(D). Effective January 1, 2006, MCR 6.004(D) was amended to eliminate the requirement of good-faith action, and the continuing viability of *Hendershot* is unclear.

Discussion

MCL 780.131(1) provides in pertinent part:

> "(1) Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this

> state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail."

Pursuant to MCL 780.131(2), the 180-day rule does not apply when a person has been charged with certain criminal offenses:

> "(2) This section does not apply to a warrant, indictment, information, or complaint arising from either of the following:
>
> (a) A criminal offense committed by an inmate of a state correctional facility while incarcerated in the correctional facility.
>
> (b) A criminal offense committed by an inmate of a state correctional facility after the inmate has escaped from the correctional facility and before he or she has been returned to the custody of the department of corrections."

MCL 780.133 states:

> "In the event that, within the time limitation set forth in section 1 of this act, action is not commenced on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

MCR 6.004(D)* incorporates the requirements of MCL 780.131 et seq. MCR 6.004(D) states:

*Effective January 1, 2006.

> **"(D) Untried Charges Against State Prisoner.**

> (1) *The 180-Day Rule.* Except for crimes exempted by MCL 780.131(2), the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certifies mail.
>
> (2) *Remedy.* In the event that action is not commenced on the matter for which request for disposition was made as required in subsection (1), no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information, or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

The purpose of the 180-day rule is to give inmates the opportunity to have "'sentences run concurrently consistent with the principle of law disfavoring accumulations of sentences.'" *People v Smith*, 438 Mich 715, 718 (1991), quoting *People v Loney*, 12 Mich App 288, 292 (1968). The rule does not apply when the pending charge carries a mandatory consecutive prison sentence. *Smith*, *supra* at 717–18, and *People v Chavies*, 234 Mich App 274, 280–81 (1999). Nor does the rule apply when the only sentencing alternatives are a consecutive sentence or lifetime probation. *People v Falk*, 244 Mich App 718 (2001). A person whose status is that of a pretrial detainee or a person being detained locally under a parole hold cannot invoke the 180-day rule. *People v Chamber*s, 439 Mich 111, 115–16 (1992), *Chavies*, *supra* at 279–80, and *People v Wright*, 128 Mich App 374, 378-379 (1983). A person whose conviction has been reversed or otherwise set aside but who nonetheless remains in the custody of the Department of Corrections, albeit not pursuant to any conviction and sentence, may not invoke the 180-day rule. *Chambers*, *supra*.

The 180-day rule applies only to persons incarcerated in state prisons in Michigan or in local facilities in Michigan awaiting incarceration in Michigan state prisons; it has no application to persons serving prison sentences in foreign countries. *People v Mackle*, 241 Mich App 583, 605 (2000). A community corrections center under the control of the Michigan Department

of Corrections is a state correctional facility within the meaning of MCL 780.131. *People v McCullum*, 201 Mich App 463, 465 (1993).

The 180-day rule does not require that trial be commenced within 180 days but rather that the prosecutor take good-faith action on the case during the 180-day period and that the prosecutor then proceed promptly to ready the case for trial. *People v Hendershot*, 357 Mich 300, 304 (1959). See also *People v Bradshaw*, 163 Mich App 500, 505 (1987). If the prosecutor takes preliminary action within the 180-day period but the initial action is followed by inexcusable delay that evidences an intent not to bring the case to trial promptly, the court may find the absence of good-faith action and thus may order dismissal. *Hendershot*, *supra* at 303–04.

All adjournments without reason and unexplained delays, including docket congestion, are charged to the prosecution. *People v England*, 177 Mich App 279, 285 (1989). Short delays related to exceptional circumstances hampering the normally efficient functioning of the trial court are excusable. *People v Schinzel (After Remand)*, 97 Mich App 508, 511–12 (1980). Delays beyond the 180-day period are not charged to the prosecution if caused by the prosecution's good-faith action to bring an intervening charge against the defendant promptly to trial and if the prosecution thereafter acted promptly to bring the pending case to trial. *People v Freeman*, 122 Mich App 260, 265 (1982). Delay caused by the prosecution's interlocutory appeal of a trial court's ruling is not charged to the prosecution. *Bradshaw*, *supra*. Delay caused by the trial court's decision to hold in abeyance a ruling on a defense motion pending a Supreme Court decision is charged against the prosecution. *People v Farmer*, 127 Mich App 472, 477 (1983).

Delays attributable to the defendant, including delays resulting from the filing of motions by the defense, are not charged against the prosecution in determining whether the 180-day period has expired. *People v Pelkey*, 129 Mich App 325, 329 (1983). Delays caused by adjournments to which the defendant has stipulated are charged to the defendant, as is a delay occasioned by a defendant's motion for new counsel. *People v Crawford*, 232 Mich App 608, 614–15 (1998). The running of the 180-day period is tolled during the pendency of a defendant's appeal or application for leave to appeal. *People v Smielewski*, 235 Mich App 196, 200 (1999).

6.44 Motion for Change of Venue

Moving Party: Defendant or prosecutor

Burden of Proof: The moving party has the burden to show good cause for a change of venue. MCL 762.7. The focus is on whether the moving party can secure a fair and impartial trial in the jurisdiction where the action is brought. *In re Attorney General*, 129 Mich App 128, 133 (1983).

Discussion

MCL 762.7 provides:

> "Each court of record having jurisdiction of criminal cases upon good cause shown by either party may change the venue in any cause pending therein, and direct the issue to be tried in the circuit court of another county."

A motion for change of venue is addressed to the trial court's discretion; the court's ruling will not be disturbed on review unless there has clearly been a palpable abuse of discretion. *People v Jendrzejewski*, 455 Mich 495, 500 (1997). There is an abuse of discretion only if an unprejudiced person would find no justification or excuse for the ruling. *People v DeLisle*, 202 Mich App 658, 662 (1993). Convenience of the parties and witnesses in a criminal case does not constitute good cause for purposes of MCL 762.7. See *In re Attorney General*, *supra* at 133–35.

The preferred practice is that the trial court defer ruling on a motion for change of venue until after jury selection has been attempted in the original county. *People v Jancar*, 140 Mich App 222, 229–30 (1985), and *People v Passeno*, 195 Mich App 91, 98 (1992), overruled in part on other grounds 229 Mich App 218 (1998).

Pretrial publicity, standing alone, does not entitle a party to a change of venue. *Passeno*, *supra*. A change of venue is required when there has been such extensive highly inflammatory pretrial publicity that the entire community may be presumed to have been both exposed to and prejudiced by it. *Jendrzejewski*, *supra* at 500–01. Where there has been extensive pretrial publicity about a case, the trial court must ensure that, in voir dire of prospective jurors, there is no impediment to discovery of possible bias and prejudice. *Id*. at 509–10.

The general rule is that, if potential jurors swear that they will put aside preexisting knowledge and opinions about the case, and that they will be able to try the case impartially based on the evidence, such pre-existing knowledge and opinions do not constitute good cause justifying a change of venue. *DeLisle*, *supra*, *Passeno*, *supra* at 98–99, and *Jancar*, *supra*. Jurors' sworn statements of impartiality may be disregarded only in egregious cases of deep community hostility to the defendant. *DeLisle*, *supra* at 663–69. The number of members of the jury array who were excused because they admitted prejudice against the defendant may be examined to determine whether community prejudice was so extensive as to impeach the stated impartiality of the remaining jurors. *Jendrzejewski*, *supra* at 511–14.

A district court does not have authority to order a change of venue in a felony case. *In re Attorney General*, *supra* at 131–32.

Part 3—Summary of Individual Motions

6.45 Table Summarizing Individual Motions

The following table summarizes the motions discussed in Part 2 of this monograph. For each motion, the moving party and burden of proof is provided. A cross-reference to the section of this monograph in which each motion is discussed in more detail is also provided.

Motion	Moving Party	Burden of Proof
Adjournment or Continuance See §6.10	Defendant or prosecuting attorney	Moving party must establish good cause for the adjournment or continuance.
Alibi Defense—Notice and Pleading Requirements See §6.11	Defendant	Defendant has the burden of producing at least some evidence in support of his claim of alibi, possibly sufficient evidence to raise a reasonable doubt.
Arrest—Delay Resulting in Prejudice See §6.12	Defendant	Defendant must come forward with evidence of actual and substantial prejudice to his or her right to a fair trial. Several appellate decisions have also required the defendant to show an intent by the prosecuting attorney to gain a tactical advantage. If the defendant makes the required showing, the prosecuting attorney must persuade the court that the reasons for the delay outweigh the resulting prejudice.
Bail—Reduction or Increase See §6.13	Defendant or prosecuting attorney. Court may also modify a prior release decision.	A party seeking modification of a release decision has the burden of going forward. Prior to arraignment on the information, a court may modify a release decision if there is a substantial reason for doing so. At arraignment on the information and afterwards, the court may review a release decision *de novo*. A party seeking review of a release decision must show that the lower court abused its discretion in setting bail.
Competency to Stand Trial See §6.14	Defendant. Court or prosecuting attorney may also raise the issue of competency.	Defendant must prove incompetency by a preponderance of the evidence. A defendant is incompetent to stand trial if he or she is incapable because of his or her mental condition of understanding the nature and object of the proceedings or of assisting in his or her defense in a rational manner.

Motion	Moving Party	Burden of Proof
Compulsory Process or Appointment of Expert Witness at Public Expense See §6.15	Defendant	Defendant must show that a witness's testimony will be material and favorable to the defense, that defendant cannot proceed safely to trial without the witness's testimony, and that defendant does not have the funds to pay for subpoenaing the witness.
Confession or Other Evidence—Suppress Because of Illegal Prearraign-ment Detention See §6.16	Defendant	Defendant must come forward with evidence showing that the evidence in question was obtained as a result of a statutorily unlawful detention. If the defendant does so, the prosecuting attorney must prove the admissibility of the evidence.
Confession—Suppress Because Involuntary See §6.17	Defendant	The prosecuting attorney must prove by a preponderance of the evidence that a confession was voluntary. A confession is voluntary if it is the product of an essentially free and unconstrained choice by its maker; a confession is involuntary if the defendant's will was overborne and his or her capacity for self-determination critically impaired.
Confession—Suppress Because of *Miranda* Violation See §6.18	Defendant	Before using a defendant's statements in its case-in-chief, the prosecution must make an affirmative showing that *Miranda* warnings were given prior to custodial interrogation and that a proper waiver was obtained. The prosecuting attorney must prove by a preponderance of the evidence that a waiver was voluntary, knowing, and intelligent.
Confession—Suppress Because of Violation of Right to Counsel See §6.19	Defendant	Before using in its case-in-chief a confession deliberately elicited from an accused following arraignment, the prosecuting attorney must show that police obtained a voluntary, knowing, and intelligent waiver of the Sixth Amendment right to counsel before they interrogated the accused.
Counsel—Substitution or Withdrawal See §6.20	Defendant or counsel for defendant	The moving party bears the burden of proof. An indigent defendant must show good cause for substitution of counsel.

Motion	Moving Party	Burden of Proof
Discovery See §6.21	Defendant, but may also be prosecuting attorney	The moving party has the burden of proving that the information sought is necessary to prepare a defense and to ensure a fair trial. If the defendant seeks privileged or confidential information, he or she must demonstrate a good-faith belief, grounded in articulable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense before the court may order an *in-camera* inspection of the records. To be entitled to a remedy for a discovery violation, the moving party must show actual prejudice.
Disqualification of Judge See §6.22	Defendant or prosecuting attorney	The moving party has the burden of showing grounds for disqualification. Parties challenging a judge on the basis of bias, prejudice, or the right to an impartial tribunal bear a heavy burden of establishing those grounds.
Double Jeopardy—Successive Prosecutions for the Same Offense See §6.23	Defendant	If the defendant makes a *prima facie* showing of a violation of the Double Jeopardy Clause, a second prosecution is barred unless the prosecuting attorney can show by a preponderance of the evidence why double jeopardy principles do not bar a second prosecution. If the defendant claims that a prosecution in Michigan is barred by MCL 333.7409, the defendant must prove by a preponderance of the evidence that the statute bars a second prosecution.
Double Jeopardy—Multiple Punishments for the Same Offense See §6.24	Defendant	If the defendant makes a *prima facie* showing of a violation of the Double Jeopardy Clause, a second prosecution is barred unless the prosecuting attorney can show by a preponderance of the evidence why double jeopardy principles do not bar a second prosecution.
Entrapment See §6.25	Defendant	The defendant must prove a claim of entrapment by a preponderance of the evidence.
Exclusion of Public and Press From Preliminary Examination See §6.26	Defendant or prosecuting attorney	In cases involving sexual offenses or misconduct, the moving party must show that the need to protect a victim, witness, or defendant outweighs the public's right of access to the examination. Denial of access to the examination must be narrowly tailored to accommodate the interest being protected.

Motion	Moving Party	Burden of Proof
Exclusion of Public and Press From Trial See §6.27	Defendant or prosecuting attorney	The moving party bears a heavy burden of proving a substantial probability that 1) prejudicial error depriving the defendant of a fair trial will result if the trial is open to the press and public, 2) closure will be effective in dealing with the danger, and 3) no alternative short of closure exists that would protect the defendant's right to a fair trial.
Fruits of Illegal Police Seizure of a Person—Suppression See §6.28	Defendant	The defendant must present evidence demonstrating the illegality, establish that the derivative evidence is the "fruit" of the illegality, and show that a substantial portion of the case against him or her is a "fruit of the poisonous tree." The prosecuting attorney must prove by a preponderance of the evidence that the evidence was free of the primary taint of a defendant's illegal arrest, or that the derivative evidence inevitably would have been discovered by lawful means, or that the evidence was discovered from a source wholly independent of the illegality.
Guilty Plea—Withdrawal See §6.29	Defendant	The defendant has a right to withdraw a guilty plea before sentence if there was an error in the plea proceeding, the court is unable to follow a sentence agreement or recommendation, or the court is unable to sentence to an agreed-upon sentence or within a specified range. If a plea has been accepted, the defendant must show that withdrawal is in the interest of justice. If the defendant makes this showing, the prosecuting attorney must show that withdrawal will substantially prejudice him or her because of reliance on the plea.
Identification at Trial—Suppression Because of Illegal Pretrial Identification Procedure See §6.30	Defendant	If counsel was not present, the prosecutor must establish that the procedure was not unduly suggestive. If counsel was present, the defendant has the burden of proving that the procedure was unduly suggestive. If a violation of the right to counsel occurred or the identification procedure was unduly suggestive, in-court identification of the defendant at trial is precluded unless the prosecuting attorney establishes by a preponderance of the evidence that the in-court identification is based on observations of the suspect other than the illegal pretrial identification procedure.

Motion	Moving Party	Burden of Proof
Impeachment of Defendant by Prior Convictions See §6.31	Prosecuting attorney	The prosecutor bears the burden of justifying admission of the evidence. If a prior conviction contains an element of dishonesty or false statement, evidence of the prior conviction is admissible if less than ten years have elapsed since the date of the conviction or the defendant's release from confinement, whichever is later. The trial court has discretion to admit evidence of prior convictions for impeachment purposes if the prior conviction is a theft offense punishable by imprisonment for more than one year and the time requirement stated above is satisfied. If the prior conviction is such a theft offense, the court must balance its probative value and prejudicial effect.
Impeachment of Defendant by His or Her Silence See §6.32	Defendant or prosecuting attorney	The general rule is that the party proffering evidence must establish its admissibility.
Insanity Defense—Notice and Examination Requirements See §6.33	Defendant	The defendant has the burden of proving the defense of insanity by a preponderance of the evidence. The trier of fact may find the defendant guilty but mentally ill if it is shown 1) that the defendant is guilty of an offense beyond a reasonable doubt, 2) that the defendant has proven by a preponderance of the evidence that he or she was mentally ill at the time of the commission of the offense, and 3) that the defendant has not established by a preponderance of the evidence that he or she was legally insane at the time of the commission of that offense.
Quash Information for Improper Bindover See §6.34	Defendant	If the defendant challenges the factual sufficiency of the evidence presented at the preliminary examination, the defendant must establish that the examining magistrate abused his or her discretion in binding the defendant over for trial in circuit court. If the defendant challenges the bindover on legal grounds, the decision is reviewed for error.

Motion	Moving Party	Burden of Proof
Rape Shield Statute—Admission of Evidence of Victim's Prior Sexual Conduct See §6.35	Defendant	If the defendant in a criminal sexual conduct case proposes to offer evidence of the victim's past sexual conduct with the defendant or evidence of specific instances of sexual activity to show the source or origin of semen, pregnancy, or disease, the defendant must file a written motion and offer of proof within 10 days after arraignment. If the defendant proposes to offer evidence of a victim's past sexual conduct with third persons to preserve his or her right of confrontation, the defendant must make an offer of proof as to the proposed evidence and demonstrate its relevance.
Search and Seizure—Suppression of Evidence Because of Defective Search Warrant See §6.36	Defendant	The defendant has the burden of proving by a preponderance of the evidence that an affiant knowingly and intentionally or with reckless disregard for the truth inserted false material in the affidavit supporting the search warrant. The defendant also has the burden of establishing his or her standing to challenge the search and seizure.
Search and Seizure—Suppression of Evidence Seized Without a Search Warrant See §6.37	Defendant	The burden of proof is on the prosecution to show that the search and seizure were reasonable and fell under a recognized exception to the warrant requirement. Where the prosecution relies on consent to justify a warrantless search and seizure, it has the burden to prove by a preponderance of the evidence that the consent was unequivocal and specific, and freely and intelligently given. The defendant has the burden of establishing his or her standing to challenge the search and seizure.
Separate Trials of Multiple Defendants See §6.38	Defendant or prosecuting attorney	When related offenses alleged against two or more defendants are joined for trial, a defendant who seeks severance bears the burden of clearly, affirmatively, and fully showing that joint trial will prejudice his or her substantial rights. A defendant may also seek severance of related offenses on the basis that severance is necessary to promote fairness to the parties and a fair determination of guilt or innocence. If the prosecutor seeks severance of the trial of multiple defendants charged with related offenses, he or she must show that severance is necessary to promote fairness to the parties and a fair determination of guilt or innocence.

Motion	Moving Party	Burden of Proof
Severance or Joinder of Multiple Charges Against a Single Defendant See §6.39	Defendant or prosecuting attorney	Joinder or severance of related offenses, joinder of unrelated offenses, and severance of unrelated offenses that the defendant has not requested to be severed, may be granted upon a showing that severance or joinder is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
Similar Acts Evidence See §6.40	Prosecuting Attorney	The prosecutor must provide reasonable notice of the general nature of evidence of other crimes, wrongs, or acts that he or she intends to introduce at trial, and the rationale for admitting the evidence. The prosecutor bears the burden of establishing the relevance of the proffered evidence. To be admissible, evidence of other acts must be offered for a purpose other than to show propensity to commit wrongdoing, relevant to an issue or fact of consequence at trial, and of probative value that is not substantially outweighed by its prejudicial effect.
Speedy Trial—Dismissal See §6.41	Defendant	Where the delay following a defendant's arrest is less than 18 months, the defendant bears the burden of showing prejudice by reason of the delay. After a delay of 18 months, prejudice to the defendant is presumed and the burden shifts to the prosecutor to rebut the presumption.
Speedy Trial—Release on Personal Recognizance See §6.42	Defendant or prosecuting attorney	The moving party has the burden of proof. A felony defendant who is shown to have been incarcerated for more than 180 days, and a misdemeanor defendant who is shown to have been incarcerated for more than 28 days, must be released on personal recognizance, unless the prosecutor shows by clear and convincing evidence that the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community. The party opposing the motion has the burden to show good cause for delay. The prosecutor must show that periods of delay resulting from adjournments requested by the prosecutor shall not be included in determining whether the defendant has been incarcerated for the requisite period.

Motion	Moving Party	Burden of Proof
Speedy Trial—Dismissal or Sentence Credit for Violation of 180-Day Rule See §6.43	Defendant	In order to invoke the 180-day rule, the defendant must show that he or she was an inmate of a Michigan correctional facility or in a local facility awaiting incarceration in a state prison. Once it is shown that a defendant covered by the rule has not been brought to trial within the 180-day period, the prosecution bears the burden of establishing good faith in readying the case for trial during the 180-day period.
Venue—Change See §6.44	Defendant or prosecuting attorney	The moving party has the burden to show good cause for a change of venue. The focus is on whether the moving party can secure a fair and impartial trial in the jurisdiction where the action is brought.

Pretrial Motions

6

Part 1—General Requirements

6.1 Introduction

This monograph contains three parts. Part 1 discusses the general requirements for pretrial motions in criminal cases. Part 2 discusses individual motions that are commonly filed in criminal cases. Part 3 contains a table that summarizes the individual motions discussed in Part 2.

6.2 Time Requirements for Filing and Serving Written Motions

A. Time Requirements Under MCR 2.119

MCR 2.119 governs motion practice and generally applies to motions in criminal cases. See MCR 6.001(D) (rules of civil procedure apply to criminal cases except as otherwise provided by rule or statute, where a rule of civil procedure clearly applies only to civil cases, or where a statute or court rule provides a like or different procedure) and MCR 4.001 ("[p]rocedure in district . . . courts is governed by the rules applicable to other actions").

Unless the court sets a different time period, written motions must be filed at least seven days before the hearing on the motion, and any response must be filed at least three days before the hearing. MCR 2.119(C)(4). Unless a different period is provided by rule or set by the court for good cause, written motions and accompanying papers (other than ex-parte motions) must be served on the opposing party at least nine days before the time set for hearing if service is by mail. MCR 2.119(C)(1)(a). Service by mail is complete at the